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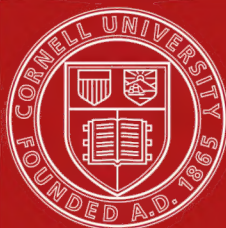
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A treatise on proceeding in rem.



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A

TREATISE

ON

PROCEEDINGS IN REM.

BY

RUFUS WAPLES.

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CALLAGHAN AND COMPANY.
1882.

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DEDICATED
TO
HON. WILLIAM B. WOODS,
OF
THE SUPREME COURT OF THE UNITED STATES.

INTRODUCTION.

BY HON. THOMAS M. COOLEY, LL.D.

If it were in my power fitly to introduce to the legal profession of the country a treatise on Proceedings in Rem, it would give me great pleasure. The need of such a treatise has long been felt, and the law has been falling into disorder and confusion—or perhaps it should be said has never emerged from it—for the want of a systematic and careful examination and arrangement of the authorities which would naturally and necessarily come under review in the preparation of such a treatise.

Fortunately, as I trust will appear, this labor of examination and arrangement has been undertaken by one whose long professional service has in large degree been given to such proceedings, and whose analytical and logical mind well fits him for the very important work of classification and arrangement. The result appears in the following pages.

On referring to these it will be found that the arrangement is simple and readily understood; but it is also entirely new. Things which may be the subject of proceedings *in rem* are classified as Things Guilty, Things Hostile and Things Indebted. At first it may strike the mind that this arrangement is rather fanciful than substantial; but this is far from being the case. It has been made as the result of a careful consideration of the whole subject, and because in the nature of things it is needful and scientific. Different principles to some extent are found to be applicable according as cases arrange themselves under one or another of these heads, and the judicial decisions need to be

classified accordingly. Distinctions which actually exist are thus easily and readily perceived and apprehended, and a guide is furnished whereby we may avoid a misleading use of analogies and a misapplication of authorities arising from a not uncommon error of supposing all proceedings *in rem* must be judged by the same rules and must depend upon the same principles for their validity.

The comprehensive character of the work will appear from a cursory examination of the table of contents. In the first book we have a general examination of principles and practice. This is not only important as a necessary introduction to the more particular and specific discussion which follows, but it is valuable by itself as a summary presentation of this very important branch of the law. In book second are discussed actions against Things Guilty, including proceedings for the forfeiture of property for frauds upon or evasions of the internal revenue and other tax laws and for the non-payment of taxes, for contravention of the navigation and collection laws, forfeitures for piracy and slave trading, for violations of neutrality laws, and for the use of property for immoral purposes.

The third book relates to actions against Things Hostile, and the title sufficiently indicates the general nature and scope.

The fourth book concerns Things Indebted. Under this head proceedings in admiralty to enforce express and implied contracts range themselves. The extension of the admiralty jurisdiction over the interior waters of the country has rendered this branch of the general subject of importance to the legal profession everywhere. In many of the states there are also statutory provisions under which liens somewhat analogous to admiralty liens are given for the redress of common law wrongs, and this treatise ought to do, and it is believed will do something towards bringing about uniformity in state laws, decisions and practice. Under the same head also, are ranged

attachments, foreclosures, probate proceedings and some others. Proceedings for the condemnation of property for causes originating in insurrection and civil war have had their appropriate treatment as a part of the general subject, and though not in times of peace of immediate practical importance, their discussion assists in the elucidation of general principles, and will aid also in making plain the distinction between things hostile and things offending.

Great labor has been carefully and conscientiously expended upon this work, and the illustrative cases have been patiently examined and studied. Where they have not been found satisfactory the author has criticised freely, but the reader will not fail to perceive that the criticism is the result of conviction and is not hasty or captious. As the author bears for himself the exclusive responsibility for his criticisms, another may be at liberty to say for him that the learning exhibited in these pages and the familiarity with the general subject which is everywhere obvious, justly entitle him to express freely his mature convictions.

ANN ARBOR, MICHIGAN, May, 1882.

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§ 1. Classification: Guilty, Hostile and Indebted Things.
The legal fiction of the primary responsibility of property,
under certain circumstances, is the basis of all proceedings *in*

rem. It assumes that property, not the owner of the property, is liable to the complainant. It treats property, therefore, as the defendant, susceptible of being tried and condemned, while the owner merely gets notice, along with the rest of the world, and may appear for his property or not.

This fiction applies to three different, distinct classes of property. It is of the utmost importance that the classification which is now stated, should be always regarded, when proceedings *in rem* are considered. The neglect of this obviously necessary classification has heretofore led to much confusion and error.

I. Things guilty.

II. Things hostile.

III. Things indebted.

Things are *guilty*, by fiction of law, when some act is done in, with, or by them, in contravention of some law having the forfeiture of such misused things as its sanction.

Things are, by such fiction, *hostile* when owned or controlled by an enemy, whether used by him or not.

Things are *indebted* when, by operation of law, they become liable for the payment of a sum of money and may be proceeded against without personal citation of the owner as the debtor.

This division will be observed throughout this treatise, because it is logical and precise, founded in the nature of such proceedings; and because the classification is absolutely necessary to avoid the misunderstanding that the neglect of it would be likely to cause. The three classes embrace all conceivable suits *in rem*; and, so marked is the difference between the classes that a court could not misplace a proceeding by treating it as belonging to one of the divisions to which it does not belong, without being led into error and confusion.

Yet there is so much common to the three classes of things that the first book will be devoted to them generally. The second will be confined to Things Guilty; the third to Things Hostile; the fourth to Things Indebted; and there will be a chapter on "proceedings *quasi in rem*."

§ 2. **What is Common to the Three Classes.** What is common to all suits *in rem*, may be summarily stated as follows:

1. All are civil actions.

2. In all, the fiction is founded on fact; or, in other words, there must always be a *jus in re* or a *jus ad rem* as the basis of the *actio in rem*.

3. The *res* must be proceeded against as the defendant.

4. The property sued must be seized and kept; or, if released *pendente lite*, it must be represented by bond and stipulation.

5. There must be a competent court having jurisdiction over the thing.

6. A libel or information against the thing defendant must be filed.

7. Notice of seizure and libel must be given to the world, if the world is to be bound by the decree.

8. Opportunity for filing claims, interventions and answers must be afforded.

9. Default should be entered against all non-appearers.

10. The judicial finding of the alleged facts is necessary.

11. Adjudication follows: judgment of condemnation or restoration.

12. The conclusiveness of the decree against all persons results, after general notice.

13. The sale of the thing condemned, after proper advertisement, is the next step; though the libellant, adjudged the owner, may retain the thing.

14. A new title arises where there has been forfeiture of the thing.

These several topics are treated in successive chapters, with other subjects closely connected; and they are, as above stated, common to all three of the classes of actions *in rem*, though it will be necessary to point out that, in some forms of proceedings against indebted things, the observance of all these fourteen requisites is not so important as in actions against guilty and hostile property; nor is there forfeiture where the right is *ad rem*.

§ 3. **How the Three Classes Differentiate.** What is peculiar to each and distinctive of the three different classes of suits *in rem*, may be briefly mentioned, in this place, as follows:

1. While proceedings against *Things Guilty* are strictly civil,

certain terms of criminal law are applicable; but such terms cannot be applied to *Things Hostile* or *Things Indebted* without creating confusion and misapprehension. "Condemnation" is applicable to all three, for the reason that it is a civil no less than a criminal term.

2. *Things Guilty* must have been *used* in contravention of law, or held in contravention of law, to justify procedure against them. Some wrong must have been intended or done in, with or by them, to create the *jus in re*, though the wrong may be one of omission. This is not true of the other two classes.

3. The *jus in re* arises always from the enemy ownership or control of hostile property. The underlying right to seize and condemn enemy property does not rest upon any fact of its actual use, but upon the fact that it belongs to a foe and strengthens him, and may be used for hostile purposes. In cases where property is caught *in delicto*, it is condemned, not because of its use, but because such use shows its hostile character, ownership and control. Even when proved to have been used in the perpetration of hostile acts, it is not to be classed with guilty things, nor is it governed by the rules peculiar thereto.

4. *Things Guilty* and *Things Hostile* further differ in this: the former are seized, tried and condemned under municipal law; while the latter are seized or captured, tried and condemned under the law of nations. Proceedings against the latter are predicated upon a state of war, either public or civil. And this distinction gives rise to many further differences, (as the reader will readily perceive,) which will be considered at sufficient length hereafter.

5. While all interested persons, notified to appear, have, upon general principles, the right to claim, in all proceedings *in rem*, yet, as *Things Hostile* are attacked because of their ownership, an enemy cannot appear in the court of the opposite belligerent to file his claim, though it sits as a court of nations.

6. The doctrine of the constructive presence of the thing defendant, is more liberally applied to hostile than to guilty or indebted things.

7. *Things Indebted*, being neither guilty nor hostile, have this marked peculiarity: they are condemned to pay some lien resting upon them. They are not forfeited, (except as they might be, should the legislator authorize, in case of pledge or pawn,) but a civil judgment for some specified amount of money is rendered against them. They are condemned to pay something; not condemned in whole as a thing forfeited. They are condemned as a whole, and sold as a whole, when indivisible, to satisfy the debt for which they have become primarily responsible, but any surplus, remaining after the sale, belongs to the owner of the thing condemned to pay. The mere condemnation does not make the indebted *res* become the property of the libellant.

8. Proceedings against a thing to enforce a lien may be stopped at any stage by the payment of the debt; but the owner of a thing seized as either guilty or hostile cannot prevent condemnation by the payment of money, unless by the consent of the libellant.

9. Both under municipal law and under the law of nations, *Things Indebted* may be libelled, as the case may require; while either of the other two classifications is confined to its appropriate system of law.

10. Decrees against *Things Guilty* and *Things Hostile*, merely declare the *status* of such things; they do not forfeit anything, but simply declare or pronounce the forfeiture previously incurred: on the other hand, decrees against *Things Indebted*, are similar to a judgment for debt against a personal debtor.

11. Things forfeited as guilty, or confiscated as hostile, become the property of the libellant; but things indebted do not, since they are merely to pay a debt, (except in case of a forfeited pledge or pawn,) and this gives rise to a marked difference as to *warranty* in the subsequent sale. For, the libellant who has become the owner, sells as owner, whether through the court or not; he warrants the title as fully as though he were selling any other property of his, either at private or public sale, and a judicial sale does not screen him: *Caveat venditor*.

On the other hand, the libellant of a thing indebted to him

in a certain sum, after that thing has been condemned to pay him that sum, does not warrant the title of the property sold by the court to make the money, since he does not sell as owner, but as creditor: just as an ordinary judgment-creditor does when he causes a sale under execution: *Caveat emptor*.

§ 4. **The Mischievous Results of Confounding the Classes.** Any serious disregard either of the general principles, or of the differences pointed out, inevitably leads to confusion and injustice. Many are the cases, in the books, which illustrate this assertion. It will be necessary to encounter the disagreeable duty of reviewing many decisions in which these distinctions have been overlooked with lamentable results. It has been frequently asserted that all actions strictly *in rem* are based upon some wrong perpetrated in, with or by the thing proceeded against; that they are criminal prosecutions of persons under the fiction of procedure against things; that in the absence of personal citation, the decree is not conclusive against all men; that because notice is given by advertisement to all the world, an enemy may appear in court and make claim; that, though the proceedings may have been in all respects regular, defaulted persons may disregard the judgment by default and make appearance without having it judicially set aside and without purging the contumacy; that decrees which are conclusive against all persons, after notice to all and after rendition by a competent court, may be collaterally attacked; and besides these, many other matters must be noticed in which there has been judicial error, partly growing out of disregard to the proper classification of actions *in rem*, and partly out of disregard to the principles which logically appertain to all such actions.

On the other hand, the great weight of authority, both in common and in civil law countries, will be found to support not only the general principles applicable to all three of the classes, but the special characteristics belonging to each; authority so conclusive that it will overwhelm the conflicting decisions. The true doctrine will not only have the support of the best judicial opinions, but it will be sustained by the logic of jurisprudence

and by argument drawn from the symmetry of the system of proceedings *in rem*.

Though the classification here made is not formally laid down in the books, yet it is so natural and so useful that the legal mind will only need have it stated to adopt it at once. It really runs through all the best decisions and authorities, though not thus formulated. It has followed the doctrine of the primary responsibility of things through all the known ages of the world.

It would be curious and interesting to trace the history of the fiction of the responsibility of things from the earliest knowledge of any jurisprudence down to the present day, and to show that the classification insisted upon has always practically prevailed though not stated in form. To accomplish this, would require much investigation, and more learning than the writer can command. It may be well, however, cursorily to mention a few suggestive facts connected with the curious history, and a few inferences that may be fairly drawn therefrom.

§ 5. **Hebrew Use of the Fiction of Things Guilty.** How early the fiction was first used in any system of law, it is impossible to discover; but, the oldest code of laws extant,—that of the Hebrews,—provided that an ox should be stoned for goring a man or woman to death.¹ This statute against an offending thing, made the distinction between a thing *moving to death* without fault of the owner, and a thing so moving by direction or fault of the owner with criminal *animus*. In the first case, the owner was not punished except incidentally by the loss of the ox; in the second, he was liable to a trial *in personam*, and, upon conviction, the penalty was death.

There was, most probably, a judicial proceeding *in rem*—against the ox as an offending thing; for Moses was accustomed to sit as a judge. Under the advice of Jethro, he established inferior courts for the trial of minor causes, while he presided over the supreme tribunal to hear the greater cases, and probably exercised appellate jurisdiction.

As a legislator, Moses availed himself of the jurisprudence

¹ Exodus, xxi: 28.

existing prior to his own enactments, as is evident from the fact that many of the provisions of his laws are merely regulative of previously existing legislation, or of a common law that had grown into force from immemorial custom. Being learned in all the knowledge of the Egyptians, among whom he had received a princely education, and had spent the first forty years of his life; and doubtless having gathered much information during the second forty, spent in Midian, he would naturally avail himself, (when he became the law-giver of his people, and came to compile statutes,) of the laws of other nations so far as he found them worthy of the enacting clause "Thus saith the Lord." And if proceedings against guilty things ante-date the Mosaic code, it is more probable that they were borrowed from the Egyptians than from any other nation, not only because the law-giver was educated in their jurisprudence, but because he found the usage readily adaptable, since the Hebrews were accustomed to those laws; and, if not derived from Egypt or Phœnicia, or some other country, such proceedings may have been in use among the Israelites before they had gone down into Egypt. Whether the Hebrews learned from the Egyptians, or the latter from the former; or whether both acted upon a common tradition, may not now be accurately known; but, if the Egyptians had the law, they may have transmitted it to Greece.

§ 6. **Adopted by the Greeks.** We are told by Pausanias that offending things were tried in the Prytaneum—regularly condemned in a court of justice;—and Æschines says: "We banish, beyond our borders, stocks and stones and steel, voiceless and mindless things, if they chance to kill a man."¹ Here the proceedings were *in rem*. Draco had laws for the condemnation of offending things, though the penalty was demolition² instead of banishment. Thus, a statue in Syracuse, having fallen upon a man and killed him, was destroyed as guilty. These laws were modified by Solon.³

¹ Æschines against Ctesiphon, 214, 245.

² Like the U. S. Statute for destroying obscene literature after condemnation, and that for the destruction

of houses on the borders of contiguous countries fraudulently used for concealing dutiable goods.

³ Plutarch's Lives: *Solon*.

Plato required that a slave should be surrendered for an offense, in case the owner should not elect to pay the damage.¹ There was a similar provision in the Salic Law of France, with reference to domestic animals, for the offense of killing a man,² and the forfeiture was preceded by regular process.

§ 7. **By the Romans.** From the Grecian states, we turn to Rome; and there, too, we find proceedings against guilty things in use at a very early period. The *noxal* action was almost precisely consonant with the above mentioned law of Plato. It is said that the Romans sent an embassy to Athens to gather from the jurisprudence there what might be thought worthy of adoption; and some of the laws of the Twelve Tables are thought to have been borrowed from the code of Solon.

In the Institutes of Justinian we read: "A noxal action is given by the *Law of the Twelve Tables*, when damage is done by brutè animals, through wantonness, fright or furiousness; and when delivered up in atonement for the damage done, the defendant is cleared from the action; for it is thus written in the Law of the Twelve Tables: *If a horse, apt to kick, should strike with his foot; or if an ox, accustomed to gore, should wound any man with his horns, etc.* But a noxal action takes place only when animals act contrary to their nature; for, when the ferocity of a beast is innate, no action can be given; so that if a bear break loose from his master, and mischief be done, the master cannot be sued, for he ceased to be the master as soon as the beast escaped."³ The edict of the Edile forbade any one to keep a dog, boar, bear or lion on a highway, the penalty of which was double the amount of the actual damage done by such a beast in case it should inflict any;⁴ and the action was personal; but, under the noxal action, the owner might exonerate himself from any personal obligation by delivering up the goring ox, or the kicking horse, *in atonement for the damage done*, as stated in the above quotation from the Institutes, accredited to *The Twelve Tables*.

¹ Plato's Laws xi.:14.

² Merkel's *Lex Salica*, C. xxxvi.

³ Justinian's Institutes, Lib. IV., Title 9, § 1. (Cooper's Tr.)

⁴ Id. § 2.

The passage referred to, however, is not preserved in the fragments of the Twelve Tables that are extant. The nearest approaches to the Justinian quotation are found in Table VII., Law I., as follows: "If a beast does any damage in a field, let the master of the beast make satisfaction, *or give up the beast;*" and in Table II., Law XII.: "If a slave has committed a robbery, or done any damage, with the privity and at the instigation of the master, *let the master deliver up the slave to the person injured, by way of compensation.*"¹

The noxal action took its name from *noxā*, as is stated in the Institutes: "*Noxa* is the slave, the offender; *noxia* is the offense, whether theft, damage, rapine, or injury;"² and noxal actions were given on account of the offenses of the slave, with the option offered to the master to pay damages or give up the offender.³

But such actions were not always confined to the wrongs perpetrated by slaves and beasts, for the compilers of the Institutes tell us: "The ancients, indeed, admitted this law of the forfeiture of the person even in the cases of children, whether male or female; but later times have rightly thought that such rigorous proceedings ought to be exploded, and it hath, therefore, passed wholly into disuse; for who could suffer a son, and more especially a daughter, to be delivered up as a forfeiture to a stranger? * * * It hath, therefore, prevailed that noxal actions should apply to slaves only; and we find it often laid down in the old books, that sons of a family may be sued for their own misdeeds."⁴ Thus, in Justinian's time, the forfeiture of children was referred to the ancients; and the better rule of their personal liability, to "the old books."

§ 8. **Early Use of the Fiction in England.** Mr. Cooper, in his annotations to his translation of Justinian's Institutes, remarks that "there is something in the law of England similar

¹ Fragments of the Twelve Tables, from Fathers Catrou and Rouille, Hook's Roman History, Vol. II., p. 314. The Fragments may be found in the appendix to some editions of Cooper's Institutes of Justinian.

² Justinian's Inst., Book IV., Title VIII., § 1.

³ *Ib.* §§ 2, 3.

⁴ Just. Inst., Lib. IV., Title VIII., § 7.

to a noxal action, in regard to animals and things inanimate, by which the death of a man is occasioned;" and he then instances deodands.¹ And, he adds, that the rule with regard to the kicking horse and goring ox may be traced in modern English decisions, several of which he cites.

Before passing, however, from Rome to England, it should be remarked that though the noxal action was modified so as to exclude the surrender of children by their parents for torts, yet procedure for offenses against things still was practiced, even against houses and other inanimate objects, according to Gaius and Ulpian.²

We find the Roman noxal law almost intact in the old Kentish code: "If any one's slave slay a freeman, whoever it be, let the owner pay with a hundred shillings, give up the slayer," etc.³ So, in the statutes of King Alfred: "If a neat wound a man, let the neat be delivered up or accounted for;" "If, at their common work, one man slay another unwillingly, [by letting a tree fall,] let the tree be given to the kindred," etc.⁴

So, in those of Edward III.: "If my dog kills your sheep, and I, freshly after the fact, tender you the dog, you are without remedy."

§ 9. **Deodands.** Speaking of guilty things "moving to death," which, upon condemnation, were sold and the proceeds devoted to the church as "gifts to God," the notator to Hale's Pleas of the Crown, says: "The origin of this law of *deodands* is traced back to the oldest periods of European religious faith."⁵ Illustrations of deodands are given in the law books as follows: A beast killing a man; a cart or horse running over a man and killing him; a falling bell, a mill wheel, and, generally, any thing "moving to death." There was a second class of deodands, including a hay-rick, a cart-wheel, or any article of property from which a man should fatally fall, though the offending things were stationary.⁶ Such things were con-

¹ "Notes and References," marginal pages 645, 646, of Cooper's Justinian.

² Digest, 39, 2, 7, §§ 1, 2.

³ Thorpe's Ancient Laws, I., pp. 27, 28, 29.

⁴ *Ib.* I., pp. 71, 79.

⁵ Hale's Pleas of the Crown, pp. 420, 421, 424, note.

⁶ *Id.* "In *aqua dulci* a ship may become deodand; but in the sea or in *aqua salsa*, being an arm of the sea,

sidered as constructively "moving to death," and were condemned as guilty, and deemed deodands.

The proceedings were *in rem*, in the Ecclesiastical Courts, but were removed to a Chancery Court, where sat the Lord Chancellor and the Barons of the Exchequer.¹ The exceptional case was when a person committed murder by the use of a weapon or other article of property. Then the proceeding was a criminal action, and, therefore, necessarily *in personam*, but the indictment always stated the value of the instrument because it was to be forfeited,² a practice continued to this day, even in this country, though the law of deodand in England was abolished since the beginning of Victoria's reign, and never has prevailed here.

From the reign of Claudius to that of Honorius, three hundred and sixty years, England was governed by the Roman Civil Law, and "her judgment seats were filled by some of the most eminent of those lawyers whose opinions were afterwards incorporated into the Justinian compilations."³ Resemblances to the noxal laws of the Digest, found in early Kentish and other English legislation, have been suggested. Though the Roman *noxales actiones* might be begun as personal suits against owners of beasts or other offending property, yet, by surrendering the guilty things, the defendants were exonerated, and the proceedings continued against the *res* only; and, when an offending thing had changed owners after the committal of the offense, the action was not brought against him who owned when the guilt was perpetrated but against his innocent suc-

though it be in the body of a county, yet there can be no deodand of the ship, or any part of it, though anybody be drowned out of it, or otherwise come by his death in the ship, because, on such waters, ships and other vessels are subject to such dangers upon the raging waves, in respect of wind and tempest; and this diversity all our ancient lawyers do agree in," etc. *The Sea Laws, Discourse I.*

¹ Hale's Pleas of the Crown, p. 421.

² If the weapon belonged to an innocent owner, it was formerly condemned as deodand for its own guilt, as "When a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner." Bracton, 122; Fleta, I. c. 25, § 9.

³ Phillimore's Int. Law, I., p. xvi of preface, and authorities there cited.

cessor, showing clearly that the offense followed the instrument. So, in England, the offense followed the thing into second hands, as, indeed, it does now in all countries where proceedings *in rem* prevail, whether there is personal crime or not; since it has long been settled that prosecution for crime *in personam* is no bar to proceedings *in rem* to condemn the instrument by which the crime or offense was committed.

But the English idea that deodands were condemned because the property moving to death was deemed "an accursed thing," as Blackstone says, would seem to point beyond Rome for its origin, back to the Mosaic code, if not even to the "primal curse."

§ 10. **The Fiction of Guilty Things now in General Use.** Whatever the origin of proceedings against deodands, or against that larger class of offending things which includes deodands, it is certain that the fiction of the responsibility of things guilty has grown more and more into favor as civilization has advanced, so that there is now a very large practice in the courts, based upon a recognition of that fiction. We do not confine our proceedings against things to those which have "moved to death," but we follow the example of our mother country, which extended the *actiones in res*, as she grew more and more enlightened, to goods and vessels guilty of defrauding the revenue and navigation laws, and to property guilty of many other offenses—we have extended them even to lands used in contravention of law. The action is not confined to the Federal government, but is also employed by the states.

Throughout the whole history of proceedings against things as guilty, in all countries where the system has prevailed, (as now in England and in the United States,) the most distinguishing characteristic of such prosecutions is that they are directed against property *in* which, or *by* which, or *through* which some law has been contravened; some wrong or offense committed, or some duty omitted: a characteristic which is not found in *hostile* and *indebted* things.

§ 11. **Early Origin of the Fiction of Things Hostile.** The forfeiture of things as *hostile* ante-dates the earliest code of laws extant—the Mosaic; for we read in the fourteenth chapter

of Genesis of the taking of spoils at the battle of the seven kings, the earliest of record. Both from sacred and profane history we learn that victors have always appropriated booty of war on no other ground than that it was enemy property: the principle is that an enemy has no proprietary rights which his opponent is bound to respect. In a war waged to take the life of a foe, his subordinate possessions have never been considered inviolate.

Gibbon, writing of the Roman usage of acquiring property by capture, (a usage not differing from that of any ancient nation of which we have any account,) says: "The original territory of Rome consisted only of some miles of wood and meadow along the banks of the Tyber, and domestic exchange could add nothing to the national stock. But the goods of an alien or enemy were lawfully exposed to the first hostile occupier; the city was enriched by the profitable trade of war; and the blood of her sons was the only price that was paid for the Volscian sheep, the slaves of Briton, or the gems and gold of Asiatic kingdoms. In the language of ancient jurisprudence, which was corrupted and forgotten before the age of Justinian, these spoils were distinguished by the name of *manceps* or *mancipium*, taken with the hand; and whenever they were sold or *emancipated* the purchaser required some assurance that they had been the property of an enemy and not of a fellow citizen."¹

§ 12. **Confiscation of the Enemy's Title.** The reason why the purchaser preferred to buy spoils taken from an enemy rather than property otherwise acquired, doubtless was the superiority of the title in being free from any possible liens, pledges, or other complications; for, since the enemy's former title was not regarded, and the new title from forfeiture was complete, he need not inquire further.

¹ Millman's Gibbon, IV., 356. In a note to this passage, Gibbon's use of the term *mancipium* is criticised, and the annotator contends that it does not mean what the author supposed, but that all movables which passed by mere delivery were included under that designation. Al-

though the term afterwards became of more general application, its origin, probably, was as Gibbon has stated, so that there is no necessary conflict. But Gibbon himself, in a note, shows some doubt about the term.

No judicial proceedings, under the Roman system at any period were necessary to ascertain the *status* of booty of war, nor are any required even now by the laws of nations; but naval captures have long been subjected to adjudication in prize courts by regular proceedings *in rem*.

It would be supererogatory to particularize respecting the forfeiture of hostile property from the earliest times down to the present, for its history is the history of war itself, and the facts are well known.

The reason why judicial proceedings *in rem* have not been in use generally among all nations, with regard to hostile things, as in the case of guilty things, is found in the fact that enemy owners have never been considered entitled to standing in the courts of the opposite belligerent to claim their property. The exception in the case of naval captures is a modern innovation in the law of nations, and is not an infringement of the general rule, since, in prize courts, enemies are not allowed to appear as claimants, either personally or by attorney. The object is to give the opportunity for persons claiming to be either friends or neutrals to appear, with the further object of placing the trial and adjudication upon record to enable other powers to inquire into the validity of decrees of condemnations after the close of hostilities. This is also true of confiscations under laws of the United States to enforce the *jus gentium*.

The most marked and distinguishing characteristic of condemnations of hostile things, is that they are based upon the enemy ownership of the *res*, and not upon any offense committed *in, with or by* it. It is true that vessels and other species of property belonging to professed neutrals are condemned when found breaking a blockade or doing some other unfriendly act, but that is because such act brands them with the enemy character, and justifies their condemnation as property owned by an enemy; the owner being deemed *pro hac vice* an enemy.

§ 13. Hebrew Use of the Fiction of Things Indebted. *Things indebted* were known to jurisprudence before the adoption of the Mosaic code. This clearly appears from the fact that, in that code, the law of pledge is treated as a previously

existing law, and is regulated—not originally enacted. It was provided, in the civil legislation of Moses, that if a man held his neighbor's raiment in *pledge* for debt, he must deliver it to the debtor by sunset that it might be used as night-covering,¹ and that "no man shall take the nether or the upper millstone to *pledge*."²

These are regulative statutes. The second is prohibitory and exceptional. Both refer to the previous existence of the pledge, though the creation of the law of pledge is not found in the books of Moses. The things pledged were primarily responsible for debt. The fiction of the indebtedness of things upon which liens rest must therefore have ante-dated the Hebrew code.

It is probable, from the exception of mill-stones, that, as a general rule, all other property was liable to be pledged as security for debt. And as we have seen that *guilty* things were probably proceeded against judicially, it cannot be doubted that there is equal probability that the courts established by Moses took cognizance of actions *in rem* against things indebted.

If so, the hypothecary action was known to the Hebrews, and probably to the Egyptians. And it is not at all likely that it was unknown to nations with whom ancient Egypt had commerce; for, if the action existed at all, it would be made applicable to ships, since thus the conveniences of commerce would be promoted. If so made applicable, there would be mutuality of practice among nations in this respect, and the hypothecation of a ship's bottom would be found a ready means of raising money, in distress, at any port. But, to induce moneyed men to lend on bottomry, the hypothecated thing must be seizable and amenable to the debt in any port, irrespective of the owner. It must itself become the indebted thing. Thus the hypothecary action would find its way into all commercial countries. And, while the fiction of indebtedness would thus be applied to vessels, it would hardly be confined to them. If the Hebrews and Egyptians, (excepting millstones,) hypothecated property, nations which traded with them would

¹ Exodus, xxii: 26, 27.

² Deut, xxiv: 6.

soon know of it, and be likely to adopt a practice so convenient and so promotive of the public welfare.

§ 14. *Use by the Rhodians.* Whether ancient Tyre and Tarshish, and other Phœnician cities, which had extensive commerce about the reign of King Solomon, were familiar with bottomry and respondentia, may not now be ascertained; but it can hardly be doubted that ancient Rhodes, (which had a flourishing commerce a thousand years before the Christian era,) used these bonds, and vindicated the liens thus evidenced, by the *actio in rem*, and transmitted both the usage and the remedy to Rome.

The ancient Rhodian naval laws were adopted by Augustus Cæsar, if indeed they had not been practiced by the Romans before. Antoninus Pius afterwards affirmed the adoption, in a rescript which is extant, and which is evidence of the Augustan law: "Let the case be determined by the Rhodian law on naval affairs, the provisions of which I direct to be observed in future, in all cases where they are not repugnant to the laws of Rome. The same decision was formerly made by the divine Augustus."¹ The meaning of *naval* seems to be equivalent to *maritime* here, for Azuni, in his Maritime Law, says: "The celebrated Cujus maintains that in all *maritime* questions the Romans ought to adhere to the laws of Rhodes, if there is no particular law existing to the contrary, and this in conformity with the directions of Augustus expressed in the ninth law of the Digest," etc.²

It is because the maritime system of the commercial world had thus been adopted, that the Pandects and the Institutes are so meager with regard to maritime provisions while they are so well stored with other matters, including the hypothecary action in its applicability to property not maritime. Indeed, the rescript from which we have above quoted, begins with the remark of Antoninus: "The earth is subject to my dominion;

¹ Digest, Lib. xiv., title, 2; Law, 9: "*Lege id Rhodia, quæ rebus nauticis præscripta est, judicetur, quatenus nulla nostrarum legum adversatur.*"

Hoc idem Divus quoque Augustus judicavit."

² Vol. I., pp. 271, 272.

the seas to that of the law;" as much as to say commercial matters belong to the law of nations.

§ 15. **Rome Adopted the Maritime Code of Rhodes.** The ancient Rhodian commercial laws are lost: those now called by that name having been proved spurious.¹ But they had been not only adopted by Rome as a system, but were regulated, as concerns contracts of bottomry and respondentia, in the *code civilis*, under the titles *de nautico fœnore* and *de usuris*. Mr. Cooper, in his notes to his Institutes of Justinian, says that the action *quasi-Serviana* is "the foundation of maritime hypothecation and bottomry." It is more likely that that action had been derived from the general maritime law which ante-dated it. To quote from the Institutes: "By the action *Serviana*, a suit may be commenced for the property of a farmer, bound for rent. The action *quasi-Serviana* is that by which a creditor may sue for a thing pledged or hypothecated to him; and, in regard to this action, there is no difference between a pledge and a *hypothèque*, though in other respects they differ; for, by the term pledge is meant that which hath actually been delivered to a creditor, especially if the thing was moveable; hypothecation means the making anything liable to a creditor by a nude agreement only, without delivery."²

Now, the action *Serviana* was introduced by the Pætor Servius, in Cicero's time, while the action *quasi-Serviana* is of later date, as the learned annotator, to whom we have above referred, admits further on in the same note; but bottomry was certainly in use in Cicero's time. Loans upon marine interest had become so embarrassed by extortion that, when the laws were codified by Tribonian and his associates, under Justinian, the rate of interest was fixed at twelve *per centum* for the voyage; upon which Gibbon makes the criticism that "the ancients were wiser" in not attempting to regulate the rate. Twelve *per centum* was the interest fixed by Cicero himself, when reducing the extortionate demands of Pompey and Brutus for loans in Cilicia when he was Proconsul there.³ Plutarch men-

¹ Emerigon, I., pp. 2, 3: Johnson's
Azuni, I., p. 286, note.

² Epist. ad Attic. Lib. iv., c. i., ii.,
iii.

³ Jus. Inst. B. iv., Tit. 6, Law, 7.

tions that Cato, the elder, was in the habit of loaning money at a high rate of interest, secured by bottomry.¹

§ 16. **The Rhodian Code Grew into General Use, as part of the Law of Nations.** It can hardly be conceived that the practice of hypothecating the ship's bottom, and the kindred practice of making the cargo also liable for debt—*respondentia*—could have been in use among the ancient Rhodians, and regulated by their maritime code, without being recognized and practiced, at the same time, by all the nations with which they were engaged in commerce; for commerce requires general and reciprocal laws. The ships themselves, within the port of Rhodes—not exclusively the foreign owners—must be primarily responsible for repairs and other causes of obligation. On the other hand, the Rhodian ship, contracting a debt in any foreign port, must be made subject to the same liability. And the same reciprocal liability must have attached to the cargoes of ships of different nationalities. The laws of bottomry and *respondentia* must have been in universal use, among maritime cities and nations, almost from the beginning of commerce upon the seas. From an argument by Demosthenes against Lacritus, it appears that all the provisions appertaining to a bottomry contract existed at Athens, in his time, much as at the present day.

These laws, as they existed in Rome, under the empire, were then as widely disseminated as the empire itself was extended. For five hundred years, that empire embraced Egypt and several African provinces; the Turkish empire, both in Europe and Asia; large portions of Austria and Germany; Sicily, Greece, the Mediterranean Islands, Spain, France and England; and the Roman laws and customs were extended over those countries.

§ 17. **Hypothecation of Both Real and Personal Property.** But the Roman law did not confine the fiction of the indebtedness of things to vessels and their contents, nor to the law merchant. The *hypotheca* of the civil system had reference to every species of movable property, and has been applicable to

¹ Plutarch's Lives: Cato, the censor.

immovable also for a long period. Pledge and pawn are as prominent. The remedy by proceeding *in rem*, (though not exclusive) seems to be as old as the occasion for it. And while it is highly probable that not only the Rhodians, but the Phœnicians used this remedy in other than maritime affairs, and that Rome derived it from nations older than herself, it is certain that she gave it to England along with the Admiralty law; if indeed the latter had not been applying the fiction and the remedy which it suggests, to other than naval things, long before.

§ 18. **Property Indebtedness Prominent in the Oldest Admiralty Codes now Extant.** The jurisdiction and processes of the Admiralty courts of England, were modeled upon those of the consular courts of the Mediterranean; and decisions were governed by the laws and usages of the *Consulato del Mare*, the Ordinances of the Hanseatic League, the *Wasserricht* of Wisby, the laws of Oleron, the maritime courts of the continent, all following the ancient system of the Rhodians.

We are accustomed to think of The Black Book of the Admiralty as something very old, yet it was compiled not much more than five hundred years ago. It is true that it contains constitutions much older: that of Henry I., A. D. 1100; that of Richard I., A. D. 1189; and that of John, A. D. 1199.

The date affixed to the laws of Oleron is A. D. 1266; but this is thought to be the date of a notarial copy, while the code is believed to be much older. These laws treat largely of bottomry, jettison, seaman's wages, salvage, pilotage, piracy, repairs and supplies, etc.; and show that the maritime law, at the time of their codification, was substantially what it is now, though there has been progress in the several directions to which they point. Those laws consist of forty-seven articles.

The Laws of Wisby, supposed to be later, are contained in seventy articles, but do not embrace all the subjects treated in the Laws of Oleron. They treat more at large, however, the subjects of seamen's contracts, wages and duties, and of freight and loss.

The Laws of the Hanse Towns, bearing date, A. D. 1597,

consisting of sixty articles, embrace bottomry, etc., but treat most largely of mariners' rights, duties, etc.

The Marine Ordinances of France, (or of Louis XIV.) A. D. 1681, constitute a maritime code, consisting of three books, divided into titles and subdivided into articles. After the subjects of captain, master, patron, (coasting captain,) mate, seaman, owners and vessels have been treated generally in the second book, there is, in the third, a separate title, (embracing several articles,) on each of the following subjects: Charter parties and freighting ships, bills of lading, freight, seamen's wages, bottomry, insurance, averages, ejections and contributions, prizes, letters of marque and reprisal. The last two titles are omitted from one of the versions of these ordinances.

The *Sea Laws* contain "A Treatise on the Rights and Duties of Owners, Freighters and Masters of Ships and of Mariners," consisting of "Three short Discourses * * * being a collection of what is most material upon these subjects in the treatise *De Jure Maritimo et Navali*, and several others, with some alterations and reflections." (The *Sea Laws*, p. 442 *et seq.*)

All of these laws and codes had reference to property as indebted; the ship's bottom was trusted for repairs, supplies, etc., though the owner was unknown; vessels and cargoes were held primarily responsible in all marine contracts; goods saved were indebted for the service rendered in saving them, etc. Indeed, the maritime law of the present day is but the outgrowth and enlargement of the system prevailing when those venerable laws were codified, and which had been in use, for the most part, for centuries before.

§ 19. **Utility and Convenience of the Fiction.** Things indebted are clearly distinguished from the other two classes of property primarily liable by fiction of law, in this important particular: their liability always arises from contract express or implied, and the operation of law thereon.

There are three classes of persons whose property, under certain circumstances, may be proceeded against *in rem*: *Offenders*, *enemies*, and *delinquents*. The character of the owner is, in each case, attributed to his property, though not to all his property, except the second class of owners mentioned. As before

shown, the property of the first must have been wrongfully used; and that of the third, subjected to a lien or pledge.

No injury nor hardship need follow the seizure of their property without a personal action against the owners themselves, since the general notice to the public supplies the want of personal citation. It is a presumption of law that every owner knows his own property and also knows what use is made of it and what obligations rest upon it by his character or acts, or his expressed or implied contracts; and he, (if not an enemy,) is privileged to appear, claim his property and defend for it against the charges.

It will be readily perceived that in a great proportion of causes *in rem*, there would be no means of making a personal citation upon the owner of the *res*. To illustrate: it is almost always impossible to know who is the owner of smuggled goods, though the fact of the goods having been smuggled may be easily proved; the sailor, suing for wages, finds it impracticable to get service upon the owner of the ship upon which the lien for wages rests, though he can readily reach the ship itself; the government, having the rights of war against confiscable property, (prize or other,) cannot serve process upon the hostile owner within the enemy's lines, though there is no difficulty in proceeding against hostile property seized or captured.

CHAPTER II.

THE CIVIL CHARACTER OF THE ACTION IN REM.

Proceedings <i>in rem</i> used as synonymous with Action <i>in rem</i>	20	"Due Process" Construed by the Supreme Court.....	23
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		Actions against enemy and debtor property, necessarily civil.....	26

§ 20. **Proceedings in rem used as Synonymous with Action in rem.** A proceeding *in rem* is an action *in rem*. The terms are interchangeable, as used throughout this treatise. Whenever, elsewhere, the first mentioned term is used to express some procedure other than an action against a thing, there is usually found ambiguity as the result, often followed by erroneous conclusions.

Action against a thing requires no more definition than action against a person requires. Every action must necessarily be either against a person or against property. The two forms of action exhaust the list. There is no middle ground, though there are actions against things with but limited notice.

The action *in rem* is distinguished from that against a person in its vindication of a pre-existing right in or to property primarily liable, by the seizure and prosecution of such property, without any suit against its owner.

§ 21. **Not for Punishment of Offenders.** Proceedings *in res* are always civil cases. They are never, in any sense, governed by rules peculiar to criminal jurisprudence. This is as emphatically true of things presumed to be guilty by reason of the wrongful acts or omissions of offenders as it is of things presumed to be hostile on account of enemy ownership, and of things presumed to be indebted in consequence of the delinquency of the personal debtor. They frequently grow out of

some misdemeanor, offense, or even crime, yet they maintain their civil character: no indictment of the offender in such cases, nor trial and conviction by a jury, is necessary. The case proceeds without reference to any criminal proceedings that may be at the same time progressing before the same or another tribunal against the culprit; without reference to the entire absence of ownership, should the property have been abandoned; without reference to the fact that the offender may have been already punished for the very act that caused the forfeiture of the property proceeded against. The smuggler, convicted and punished for his crime, cannot plead his conviction in bar of the civil action *in rem* to declare the forfeiture of the goods smuggled. He is not, in the eye of the law and of the constitution, thus twice punished for the same offense, for the action, to fix the *status* of the goods, is not against him.

The provisions of the constitution of the United States, inhibiting the subjection of any person twice for the same offense, to be put in jeopardy of life and limb,¹ is not applicable to proceedings *in rem* for forfeiture and criminal prosecution to punish the offender, though the two actions be carried on at the same time, and be based on the same offense. Neither the letter nor the spirit of this constitutional provision is violated by the simultaneous prosecution of the two trials. Had the provision been extended so as to include *property* after "life and limb," there would even then have been no inhibition of the *actio in rem*, although the offense, lying at the base of the action, might have been already punished by personal, criminal action.

The requirement, that "The trial of all crimes, except cases of impeachment, shall be by jury,"² has no reference whatever to the action for the forfeiture of a thing with which even a criminal offense has been committed. Such a case need not necessarily be tried by a jury, for it is not a "trial of a crime." Where, in a case of the kind, a jury trial is had, it is not by virtue of the requirement above quoted, but of rules of law governing civil cases.

¹ Fifth Amendment of the Constitution.

² Constitution, Art. III., Sec. 2, par. 3.

§ 22. Actions Against Things are "Due Process of Law."

In this connection it may be well to advert to the clause of the constitution which provides, that "no person shall be * * * deprived of * * * property without due process of law."¹ Does "due process of law" mean indictment and trial by jury? Doubtless it does, so far as life and liberty are concerned.

It has been learnedly contended that the phrase "due process of law," as here used, is synonymous with "the law of the land," as used in the Bill of Rights; and that these words in the bill signify indictment and trial by jury. Lord Coke says that the words by "the law of the land," as originally used in *Magna Charta*, mean, in their true sense and exposition, "by indictment or presentment of good and lawful men."² The barons, when wresting from King John this formal acknowledgment of their rights, had in view the abrogation of arbitrary arrests, imprisonments and executions; and this needed concession from the crown, which was first known as *Magna Charta de Libertatibus*, was meant to protect every Englishman in the free enjoyment of his life, liberty and *property* until declared forfeited by the judgment of his peers and the "law of the land."³

Now, conceding that the phrases "the law of the land" and "due process of law" are convertible, is there any inhibition of the civil forfeiture of the property of an offender who has been criminally convicted and punished for the offense; any inhibition of such forfeiture without the indictment of the offender for the offense, and trial by a jury of his peers; any such inhibition, either by *Magna Charta* or the Constitution of the United States? Did the barons exact from their king, (or did the framers of our constitution design,) any such inhibition? Did Lord Coke have in mind the common methods of procedure in the English Court of Exchequer for property forfeiture when he wrote what is here cited from his *Institutes*? Evidently the matter in consideration by them all was some-

¹ Fifth Amendment of the Constitution.

² Coke's Inst. II., 50, 51; II Kent's Com., xxiv., p. 13, marg.

³ *Magna Charta*, 29 Chap., 9 Hen. 3; Bouvier's Law Dic., *verbo*, *Magna Charta*; I Reeve's Hist. English Law 209, 231.

thing quite different, and we must understand their language accordingly. Evidently they all meant that life, liberty and property should not be arbitrarily taken, without fair trial, without jury trial in cases of life and liberty; and of property, too, where the government had no *jus in re*. Had the attention of Lord Coke been called to the liability of his language to such perversion as it has since been subjected to by loose writers, he doubtless would have been the first to explain that he did not mean to confine the phrase "law of the land" so as to cut off the well established practice in the Courts of Admiralty and Exchequer for civil forfeitures. He would have been the first to admit that the phrase has a larger signification than he has literally expressed. And so the words "due process of law" have a meaning which broadly covers all approved processes known to our courts at the time the fifth amendment was adopted, and to those of the country from which our system of jurisprudence was derived.

Chancellor Kent expresses the true idea when he says, after alluding to Coke's exposition, "the better and larger definition of the words 'due process of law' is law in its regular course of administration through courts of justice."¹ He should not be understood, however, as enlarging Coke's exposition of "the law of the land," so far as that exposition was meant to apply, that is, to trials for crime, with reference, also, to deprivation of life, liberty and property, as herein above explained. It was to embrace civil cases in their various well known forms of process that he gives the "better and larger definition." "Due process of law" means any process known to the law, criminal or civil, at the time when the provision was adopted.

Manifestly, it would not do to extend this definition to the literal words of Kent, for, "law in its regular course of administration through courts of justice," might palpably violate the spirit of the provision. The object of the fifth amendment was to place the rights of the people above the arbitrary will of the law-enacting department of the government, and on a plane with those of Englishmen under their Bill of Rights.

¹ II Kent's Com., xxiv., 12, 13.

Statutes might authorize processes that would be in contravention of the law as administered when the amendment was adopted, and as then sanctioned by approved usage; and the fact of such new statute law being "administered in courts of justice," would not be any argument for its constitutionality.

Proceedings *in rem* are "due process of law" as understood in the Constitution.¹

§ 23. **How Construed by the Supreme Court.** In a civil case,² Mr. Justice CURTIS, said: "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in *Magna Charta*, which, Lord Coke says, mean due process of law. The constitutions which had been adopted by the several states before the formation of the Federal constitution, following the language of the great charter more closely, generally contained the words 'but by the judgment of his peers and the law of the land.' The ordinance of Congress, of July 13, 1787, for the government of the territory of the United States northwest of the Ohio river, used the same words. The Constitution of the United States, as adopted, contained the provisions that 'the trial of all crimes, except in cases of impeachment, shall be by jury.' When the fifth amendment, containing the words now in question, was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the state constitutions and the ordinance of 1787, the words of *Magna Charta*, and declared that no person shall be deprived of his life, liberty or property but by the judgment of his peers or by the law of the land, would have been, in part,

¹ The Confiscation Cases, 20 Wal. 92, 110; 1 Kent, 104; Sargeant's Const. Law, 209-220; La Vengeance, 3 Dal. 297-301; U. S. v. Whelan, 7 Cr. 112; The Betsey and Charlotte, 4 Cr. 443, 446, note; Fisher v. McGirr et al., 1 Gray, 27, 28; Gray v. Kimball, 42 Me. 299; The Palmyra, 12 Wh. 1, 14, 15; U. S. v. Dry Goods, 17

How. 85-93, Caldwell v. U. S., 8 How. 366, 381, 382; U. S. v. Morris, 10 Wh. 246; Fontaine v. Phoenix Ins. Co., 11 Johns. 300; McCulloch v. State of Maryland, 4 Wh. 416.

² Murray's Lessees et al. v. Hoboken Land and Improvement Co., 18 How. 276.

superfluous and inappropriate. To have taken the clause 'law of the land,' without its immediate context, might possibly have given rise to doubts which would be effectually dispelled by using those words which the great commentator of Magna Charta had declared to be the true meaning of the phrase 'law of the land' in that instrument, and which were undoubtedly then received as their true meaning."

What is *due process*, depends, of course, upon the character of the judicial proceedings in which it is issued. Thus, we use *citation* in an ordinary action at common law; *subpœna*, injunction, etc., in an equity case; monition in an admiralty case *in rem*, but *subpœna* in an admiralty case *in personam*; service of the indictment or information in a criminal cause; distress warrant in certain classes of revenue cases, etc., etc. Each class of cases has its *due process*; what is appropriate to one may not be so to another. But the inhibitions of the constitution which prohibit Congress from any material change of processes known to the jurisprudence of England and the United States at the time of their adoption, must be understood to be confined to those that would affect the people's rights to life, liberty and property as then existing, and not to cripple Congress in any proposed changes not affecting those rights. There has, however, been no legislation impairing or materially modifying the old and necessary method of proceeding directly against things for the declaration of their forfeiture, in all the legislative history of this country.

§ 24. **Fixing the Status.** If the fixing of the *status* of property from the fact of a criminal offense having been committed by the owner, is a disguised method of punishing for crime, the action, in such case, is clearly inhibited by the spirit of the clauses of the constitution which we have been considering. It would clearly be undue process of law. It would be a means of doing indirectly what is clearly prohibited. It would be a criminal prosecution, in fact, without indictment and the service of the indictment, without a trial of the real defendant by jury, without the true defendant being necessarily in court at all.

But the fixing of the *status* of property by the *actio in rem*, based upon the fact of a criminal offense having been committed with it by the owner, does not differ from the fixing of the *status* by such action based upon some act not criminal. In neither case is the property forfeited by the proceedings: in both, the object is merely to ascertain whether it has been forfeited. The court simply declares the forfeiture. Whether the owner is guilty of a crime or not, the thing proceeded against may be *guilty* under the legal fiction. The guilt of the owner is to be ascertained, if ascertained for the purpose of punishing him, by a criminal trial. The *guilt* of the thing, (which is frequently averred in the libel to belong to some person or persons unknown,) is ascertained by proceedings *in rem*. The thing thus judicially found to be a forfeited thing, does not belong to him whose act has caused its forfeiture, and therefore he is not punished by the condemnation of it. It cannot have belonged to him since the time he forfeited it by his act criminal, or *quasi* criminal, or not criminal at all: therefore he is not punished by the judgment of condemnation and his deprivation of the possession of the thing. The retro-active effect of such judgment will be discussed in its proper place.

As actions *in rem*, based upon criminal offenses committed in, with, or by the things proceeded against, are not criminal actions in disguise, and not violative of the spirit of the constitution, but are strictly civil actions, there is no reason why a personal, criminal action should not be used to punish the culprit for his crime. If, in this strong case, the *actio in rem* is clearly distinguishable from the criminal prosecution, how plainly does it appear that proceedings for declaration of the forfeiture of a pledge, or of the forfeiture of a thing hostile because owned by an enemy who may never have been subject to our municipal laws, are strictly civil and entirely free from the constitutional inhibitions having reference to criminal accusations!

§ 25. **Civil Character Shown from Decisions.** Chief Justice MARSHALL said, upon the trial of an information¹ to

¹ United States v. La Vengeance, 3 Dal. 297.

declare the forfeiture of a ship for having exported arms and ammunition in contravention of law: "We are unanimously of the opinion that it is a civil cause; it is a process in the nature of a libel *in rem*; it does not, in any degree, touch the person of the offender."

Chief Justice SHAW, of Mass., said in behalf of the court, in a case declaring the forfeiture of gunpowder for having been kept in violation of law:¹ "The court are of opinion that a libel sued as a process *in rem* for a forfeiture is in the nature of a civil action, and that either party may file exceptions in matter of law."

Mr. Justice STORY said:² "It is not true that informations *in rem* are criminal proceedings. On the contrary, it has been solemnly adjudged that they are civil proceedings." And Mr. Justice SARGENT said in a State case in New Hampshire:³ "This is a proceeding *in rem* for the condemnation of the liquor and vessels. No penalty or fine is imposed, upon the person who keeps the liquor with intent to sell, under this proceeding. * * * It is a proceeding which cannot be commenced by an indictment; and the complaint which is made in the first instance is in the nature of a libel, such as Ch. 204 Revised Statutes provides for, and not in the nature of a criminal complaint against any person, but is simply a proceeding *in rem* against the liquors, etc., for their condemnation as forfeited property. This class of cases is to be considered and tried as civil causes are tried."

Personal actions to recover penalties have as much analogy to actions *in rem* for forfeiture as any class of suits have, yet they are invariably held to be civil actions; admiralty causes against vessels or goods for forfeiture, revenue cases, and all species of proceedings *in rem*, against things guilty, hostile or indebted, are well settled to be civil, and not, in any sense, criminal actions.⁴

¹ Barnacoat et al. v. Gunpowder, 1 Met. 230.

² Anonymous Case, 1 Gal. 23.

³ State v. Barrels of Liquor, 47 N. H. 374.

⁴ Cawthorne v. Campbell, 1 Anst.

205, 214; Atty. Genl. v. Freer, 11 Price, 183; Earl Spencer v. Swannell, 3 M. & Welb. R. 162; 1 Bacon's Abr., Title Amendments and Jeofails, A. & C.; Attorney General v. Rogers, 11 M. & Welb. R. 670; 3 Black.

§ 26. **Actions against enemy and debtor property necessarily civil.** Since things prosecuted as fictitiously guilty are proceeded against by civil action, though there are offenders behind them, it seems almost unnecessary to show that things are proceeded against, when they are hostile, by civil action. The personal owners, behind such things, are enemies; and, as such, they are not usually susceptible of being arrested for personal trial, nor are they amenable to the jurisdiction of the municipal courts of the belligerent opposed to them. Civil enemies or insurgents cannot be indicted or tried as enemies, though they might be, as criminal citizens. But since property, when proceeded against as enemy property, whether as prize or as property seized upon land; whether as public-enemy property or citizen-enemy property, cannot be indicted and tried, the procedure against it must necessarily be civil. This need not be enlarged upon, by way of confirmation, since the legal reader may be presumed readily to concede the proposition that all proceedings against enemy-property are civil. The doctrine that proceedings against things hostile are all civil, is however, well settled. All naval-prize confiscations are pronounced in civil proceedings; and all confiscations of enemy property seized upon land are also pronounced in civil causes; and so are all judgments enforcing liens.

If any apology be needed for devoting a chapter to show that proceedings *in rem* are always civil in character, it may be found in the fact that there are decisions in which this characteristic has been overlooked; in which it has been held that criminals may be punished by such proceedings—even for treason—without being personally arrested, confronted with witnesses, tried and sentenced.

Com. 159; 4 Black. Com. 361, 362; 1 Durnford & East, 753; Markle *v.* Akron, 14 Ohio, 590, 591; Rex *v.* Mallard, 2 Strange, 828; Ketland *v.* The Cassius, 2 Dall. 365; Adams *v.* Woods, 2 Cranch, 336; United States *v.* The Sally, 2 Cranch, 406; United States *v.* The Betsey and Charlotte, 4 Cranch, 443; United States *v.* Mann, 1 Gall. 178, 179; United States *v.* Lyman, 1 Mason, 498; United States

v. Bags of Coffee, 8 Cranch, 398; United States *v.* Brigantine Mars, Id. 417; Gelston *v.* Hoyt, 3 Wh. 311; United States *v.* The Palmyra, 12 Wheat, 12, 13; Caldwell *v.* United States, 8 How. 366, 381; 1 Chitty Pl. 101; Gelston *v.* Hoyt, 13 Johns. R. 584; 3 Black. Com. 160-162; The State *v.* Williams, 7 Rob. (La.) 266; Bacon's Ab. *verbo* "Debt" A.; Gray *v.* Kimball, 42 Me. 299.

CHAPTER III.

THE *JUS IN RE* AND THE *JUS AD REM*.

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§ 27. **Difference Between the Two Rights.** *Jus in re* is the absolute and exclusive right to a thing, susceptible of being enforced by the *actio in rem*.

Jus ad rem is a relative right resting upon a thing, susceptible of being enforced by the *actio in rem*.

Briefly, the former is the right to property, and the latter a right in property. Such is the legal signification of these terms, though some writers, (owing perhaps to the liability of the prepositions to be misinterpreted in this connection,) have even reversed the meaning of the two. Others have made possession of the *res* necessary to the existence of the *jus in re*, which is wholly unwarrantable, since right of proprietorship may be complete while the person holding the right may or may not be in possession of the property. On the other hand, one may be in possession of a thing, yet have only a *jus ad rem*, susceptible however of becoming a *jus in re* upon failure to redeem, as when the property is held in pawn or pledge.

Marcadé defines the terms with general accuracy, making the *jus in re* independent and absolute, exercised *per se ipsum* by applying it to its object; while the *jus ad rem* is the faculty of demanding and obtaining the performance of some obligation by which another is bound *ad aliquid dandum, vel faciendum, vel præstandum*.¹ But such obligation must

¹ 2 Marcadé, 350.

necessarily be susceptible of enforcement directly against some *thing*, and not merely a personal obligation. The illustration, which he gives, of the creditor's right to collect a thousand dollars of his debtor, is not a good one, since, to constitute the *jus ad rem*, the right must rest specifically upon some property; for, otherwise, it would only bear personally upon the debtor. Marcadé is also inaccurate when he says that every *jus in re* may be vindicated by the *actio in rem* against him who is in possession of the thing; for the right often exists when the law does not authorize the corresponding remedy, as will be shown, further on, in this chapter. Indeed, the illustrations which he gives of one's ownership of a horse, usufruct of a flock of sheep, servitude over land, etc., though applicable to the right, are instances in which the law does not usually afford the remedy of the *actio in rem*, when it becomes necessary that the right be legally enforced. The right, as illustrated, is susceptible of being so enforced, should legislation so provide; and that is all that is requisite to complete his definition. But he is certainly in error when he speaks of the right being vindicated "against him who is in possession of the thing," since *ex necessitate rei*, the action must be directly against the thing itself. His illustration of *jus ad rem*—the mortgage—is strictly pertinent, as mortgage is understood in the civil law, and wherever it operates as a lien; though foreclosures are usually personal actions with prayer for the sale of the mortgaged property—not actions *in rem*, *idem erga omnes*.

§ 28. **Admiralty Illustrations.** Every suit to have a vessel declared forfeited for violation of law is to enforce a *jus in re*: every suit on bottomry or respondentia bonds, or freight contracts, or for repairs or supplies, or by a seaman to enforce his lien for wages directly against the ship on which he earned them, is to enforce a *jus ad rem*. Every case on the prize side of the court, to confiscate enemy's property, is in vindication of a *jus in re*: every case to enforce a lien, is in vindication of a *jus ad rem*.

Judge STORY says: "A lien is not in strictness either a *jus in re*, or a *jus ad rem*; but it is simply a right to possess and retain property until some charge attaching to it is paid or

discharged.”¹ And again: “A lien is not, strictly speaking, either a *jus in re*, or a *jus ad rem*; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing. At law, a lien is usually deemed to be a right to possess and retain a thing until some charge upon it is paid and removed.” It seems that his reasons as fully prove the right to be a *jus ad rem*, as that it is not a *jus in re*. That which is “simply a right to possess and retain property until some charge attaching to it is paid or discharged,” can be nothing else than a *jus ad rem*. A lien, without possession of the thing on which it rests, is also a *jus ad rem*, as the seaman’s lien against a ship. On the other hand, in the absence of “property in the thing itself,” it is apparent that there can be no *jus in re*.

Much confusion of ideas has resulted from confounding terms in the expression of these two very different rights; and it is therefore important that the reader should start correctly in the first stage of travel over the extensive ground before him. Such confusion will frequently be encountered in decisions of courts as well as in elementary books. In the case of the *Amy Warwick*, when before the U. S. District Court for Massachusetts, the judge treated the two rights as follows: “The general doctrine seems to be that where a neutral has a *jus in re*; where he is in possession with right of retention until a certain amount is paid to him, the captor takes *cum onere*, and must allow the amount of such right. But where the neutral has merely a *jus ad rem*, which he cannot enforce without the aid of a court of justice, his claim will not be recognized by a prize court.” When that vessel was brought before the United States Supreme Court, on appeal, the *jus in re* was found to be in the government because of her enemy character, and the lien for freight was an alleged *jus ad rem*, though not allowable against the hostile *res*.² Had the district judge noted the views expressed in the cases which he cites, he

¹ Story’s Eq. Jur. 1, § 506; Ib. 2, §§ 1,215, 1,216.

The *Amy Warwick* et al., 2 Black. 686.

would have found that neither Lord Stowell nor Mr. Justice Washington had made the mistake of holding the *jus in re* to be the right resting upon property in possession.³

The lien upon a thing in possession constitutes a *jus ad rem* exactly as a lien upon a thing not in possession, "which cannot be enforced without the aid of a court of justice."

§ 29. **Errors Noted.** The rather common errors, among the elementary common law writers, have been that title to property in possession constitutes the *jus in re*, and that title to property not in possession constitutes the *jus ad rem*: errors that have been fully exposed by Marcadé, as above shown; but Judge STORY advances the equally untenable proposition, that when a lien holder has "the right to possess and retain property until some charge attaching to it is paid or discharged," such right is neither a *jus in re* nor a *jus ad rem*. Upon a moment's reflection, the reader will perceive that possession of the thing to which, or upon which either right rests, has nothing whatever to do with the right itself; that one's right to a thing may be perfect, though he may have been deprived of the possession; and that one's right to be paid out of a thing may be complete without his having the thing in hand. Of course, such thing must be seized, taken in hand, before the *actio in rem* can operate; but, *ex necessitate*, the right must exist before the seizure.

True, there are liens, (such as arise from pledge and pawn, for instance,) in which possession is necessary to the existence of such a *jus ad rem* as is enforceable by the *actio in rem*, but the possession required cannot convert the right of lien into a *jus in re*. If, however, the condition of the contract of pledge or pawn be that in case of the happening of a certain event, (such as non-payment at the maturity of a loan,) the pledged or pawned goods shall be forfeited, the right of the pledgee or pawnee becomes a *jus in re* from the date of the forfeiture, since he acquires the right of ownership. If resort to court should become necessary, in order to vindicate that

³ The Tobago, 5 C. Robinson, 218; The Marianna, 6 Ib. 25; The Francis, 8 Cr. 418.

right, that fact would not affect the character of the right, which became fully matured when the debtor failed to pay according to his stipulation.

§ 30. **Statute Instances of the Two Rights.** Under the confiscation laws, the right of the government to certain designated enemy-property, is a *jus in re*, while that of the lien holder to intervene for payment out of the proceeds, under the statute,¹ is a *jus ad rem*. So, under the navigation laws, where vessels are forfeited for their imputed offenses, the government's right to them is *in res*; but where they incur penalties enforceable against themselves, the right of the government is merely relative. So, also, under the collection laws. For instance, the United States have the absolute right to merchandise illegally transported; but the right is relative when ships or goods are rendered liable to pay a sum of money for some contravention of these laws. Real estate, as well as personal property, constituting part of a distillery establishment, is forfeited for certain violations of the internal revenue laws; while, for other violations, property merely becomes subject to a government lien upon it. The navigation, collection and internal revenue laws are full of matter for illustration. There might be drawn further examples from the laws against piracy, the slave trade, obscene publications, etc., and from statutes of several of the States.

§ 31. **Common Law and Equity Liens.** Among common law liens, (not generally enforceable by proceedings *in rem*,) are those of common carriers on the goods they transfer; hotel keepers, on the baggage of their guests; warehousemen, on goods for storage; tailors, on clothes made by them; vendors, for the price of things sold but not delivered; judgment creditors, upon the land of their debtors.

Of equity liens, (not enforceable, however, by the direct action against things,) are those which arise from constructive trusts; from the sale of land, for the price; from assignments under bankrupt and insolvent laws; from deposit of title deeds to secure the payment of money; from covenant by a tenant of

¹ U. S. Rev. Stat., § 5,322.

real estate for life, giving to trustees profits of such estate for specified objects; from marriage settlements binding real estate before title given; from obligations entered into to settle an annuity from the profits of certain property; from necessary repairs and improvements made upon property by one partner for the benefit of all, and from various other implied trusts.

Though some liens are not enforceable by proceedings *in rem*, they are all susceptible of being thus enforced, should the legislative power so authorize; for they all rest necessarily upon property.

§ 32. **Unconstitutionality of the Action in rem when there is no jus in re or ad rem.** The action against a thing must always be based upon a pre-existing right *in* or *to* that thing. This underlying right must be complete before the institution of proceedings *in rem*, since the object of the action is not to forfeit property, nor to create a lien, but to have the forfeiture, previously incurred, now judicially declared; or the lien previously created by contract or by the operation of law, now judicially enforced.

That the government, except in the exercise of the right of eminent domain, and then upon due compensation rendered; or that a private individual, under any circumstances, can proceed against the property of any person in the absence of any *jus in re* or *jus ad rem*, without first bringing a personal action against him, is a monstrous proposition. But that property already forfeited or already subject to a lien, may have its *status* judicially pronounced upon proceedings directly against itself, pursuant to law, with notice of such proceeding given to all persons, and with the right of defense accorded to persons interested, is a very different proposition. The latter, (as shown in the previous chapter,) would be "due process of law:" the former certainly would not be.

The provision of the Constitution of the United States, 5th Amendment, that no person shall be deprived of property without due process of law, would be clearly violated, were property taken from its owner by the *actio in rem*, in a case where there was no *jus in re* or *ad rem*. For illustration, a statute that should provide for the forfeiture of a ship engaged

in legitimate commerce, by proceedings directly against that ship, for the offense of illicit trade carried on by another ship belonging to the same owner, would be manifestly violative of the above mentioned constitutional provision. It would be subject to the fatal objection that it sought to punish the owner, for a criminal act, by a criminal proceeding disguised as a civil one, in which he would not be a party defendant; in which he would really be punished without presentment or indictment and trial by jury; without the judgment of his peers and the law of the land. So, to proceed against an innocent cargo because another cargo of the same owner has been smuggled; against a pure pond because its owner has a malarious one which is a nuisance, etc., would manifestly be to punish the owner, and would be open to the above constitutional objections.

But there is no danger of this abuse in cases where, by fiction of law, property becomes primarily liable by reason of its being hostile; for, evidently, if the owner is an enemy, all his property has acquired the hostile character whence arises the *jus in re*.

The right often arises when the owner is not a general enemy but merely such *quo ad* a particular property. Should a nominal neutral use his vessel to perpetrate some hostile act, such as the breaking of blockade, he would be deemed by public law, an enemy *pro hac vice*, and the right of the injured nation to confiscate the vessel would be found in such enemy-ownership, though no right to confiscate his other, unused property would arise, for the reason that he would be but a qualified enemy. He would be an enemy-owner only in relation to the vessel used.

So, in confiscations under the non intercourse acts: the person transporting goods to or from states in insurrection, might not be a general enemy, but the law deems him such *quo ad* the transported goods, and gives the right to condemn them for their hostile character acquired by such hostile ownership. Another illustration may be found in the confiscation act of 1861, which authorizes the condemnation of property used for insurrectionary purposes. Such use of property makes the owner an enemy *pro hac vice*, though not in arms and not pro-

fessedly a foe; and the *jus in re* vests in the government so far as the used property is concerned, while no such right applies to the other property of the owner of that used thing.

Under the confiscation act of 1862, not all hostile property is authorized to be proceeded against, but only such classes of property as are therein specified. And this classification of property being designated by description of the owners, all of the property of such owners may be condemned without reference to any use made of it, since the *jus in re* arises from the enemy-ownership, precisely as in the case of enemy ships captured at sea.

The character of all the property of a general enemy being wholly tainted by hostile ownership, it is not at all necessary that there should be any illegal traffic; or any wrong of any sort done in, with, or by it, to give rise to the *jus in re* to be enforced by the *actio in rem*, in a prize court, or in such international tribunals as those which sit to confiscate hostile property under such authorizations as our non-intercourse and confiscation acts, proceeding, as they must, under the law of nations.

However differently the *right* may arise—(in things hostile by ownership; in things guilty by use; in things indebted, by operation of law,) it must exist before proceedings *in rem* can be lawfully and constitutionally instituted. The existence of such right is usually discerned without difficulty, though sometimes it is not so apparent where things guilty and things indebted are concerned as it is with regard to enemy property. Property is, under several laws, deemed guilty for non-use, where such non-use is in contravention of statute. Nuisances might be abated by the legal authorization of proceedings *in rem*; for the government, in the exercise of its police powers, has a right *in* a thing which is a nuisance so far as to remove it; and a right *to* such a thing so far as to destroy it, if the destruction be necessary. Taxes might be collected by suits *in rem*, since government has a right *in* the taxed property to the amount of the assessment. Further on, there will be occasion to advert to statutes giving the *jus in re* for non-usage; and to two at least which authorize the destruction

of property, condemned by action *in rem*, in the exercise of the police power.

The *jus ad rem* arises, by operation of law, not only upon expressed contracts in which it is stipulated, but sometimes upon implied contracts, and upon contracts where the right arises by law without any stipulation upon this subject, whether the contract be expressed or implied. The sailor, for his wages, or the ship-wright, for repairs, has a right in the ship navigated or repaired to the amount due, though not stipulated in the contract.

§ 33. **The Right Against the Thing not Impaired by a Co-existing Right Against its Owner.** The sailor, for instance, may have a perfect right to proceed against the vessel for his wages, while, at the same time, he has his action against the owner, if he elect to institute the personal action. The government may libel a vessel for some use of it in contravention of law, or may sue the owner for penalty, under some statute giving choice of remedies. It may indict the smuggler, and at the same time, seize and libel and condemn the smuggled goods. In the last illustration, the personal action would be a criminal case, while the action *in rem* would be civil, and there would be no conflict.

In an action to have a vessel declared forfeited for the exportation of fire-arms, the Supreme Court, though Chief Justice MARSHALL, said: "We are unanimously of the opinion that it is a civil case; it is a process in the nature of a libel *in rem*; it does not in any degree touch the person of the offender."¹ Had the arms and ammunition been sent to a foreign enemy of the government, the act would have been one of giving "aid and comfort" to the enemy; it might have been an act of treason, since the owner of the arms was himself a citizen: would the unlawful and treasonable use of the property, any the less have given the proper *jus in re* as the basis of the *actio in rem*?

§ 34. **Omissions and Slight Offenses.** By operation of law, the *jus in re* often arises upon very slight use of the thing. "Most of the forfeitures denounced by our laws," says Conkling

¹ United States v. La Vengeance, 3 Dall. 297.

in his Treatise,¹ "are imposed for omitting to do some act enjoined by law." Taking a false oath to procure the registry of a vessel, was made ground for the forfeiture of the vessel by statute,² and the Supreme Court held that the *actio in rem* against the vessel would lie.³ By the transferring of any licensed vessel, even in part, to any person not a resident citizen of the United States, the whole vessel was forfeited;⁴ and though by reason of such transfer the license *eo instanti* became void, yet the act of transferring gave sufficient basis for the action against the vessel.⁵ This right of action seems the more slight when we reflect that the owner who made the transfer was not the owner when the forfeiture was declared, for such transfer was not itself void.⁶ The transferee, however, was personally as much to blame as the seller. And, to narrow this ground of action to the smallest compass, we may add that such forbidden transfer did not even have the effect to change the American character of the vessel.⁷

The forfeiture of goods for the negative offense of the master, (not necessarily the owner,) of the vessel conveying them—neglect to deliver the manifest within a specified time, under the same act,⁸ and the forfeiture of the vessel, too, in case such goods should amount to eight hundred dollars,⁹ would seem to be almost an extreme exercise of the legislative power in the use of the action *in rem*; but it seems to have called forth no strictures on the part of the Supreme Court.¹⁰ Many such provisions abound in our revenue laws, which have been unhesitatingly sustained by the courts.

§ 35. **The Right without the Remedy.** While there can be no action *in rem* without the corresponding right, the converse does not always hold good. There may be an existing *right to* or *in* a thing, yet no legal authorization to enforce such right

¹ Conkling's Treatise, 548 (4th Ed.)

² Act of Congress of Dec., 1792, I., U. S. Stat. p. 287.

³ United States v. Grundy et al., 3 Cranch, 337.

⁴ Act of Feb. 18, 1793.

⁵ The Schooner Two Friends, 1 Gall. 118.

⁶ Phillips v. Ledley, 1 W. C. C. 226.

⁷ United States v. Schooner Hawke, Bee's Rep. 34.

⁸ Act of Feb. 18, 1793.

⁹ Ib.

¹⁰ United States v. Carr, 8 How. 1.

by action direct against that thing. It is necessary that the action be authorized by statute, except where there is general authorization, as in admiralty law. Many States create liens by statute, or allow their creation by contract, and yet do not authorize their consummation by proceedings *in rem*, good against the world, without personal citation beyond the general, published notice. All the liens under the laws of Congress are not enforceable by such proceedings, though those in favor of the government usually are. There are exceptions, however, with regard to the latter, for many contraventions of law, by the wrongful use of property, give rise to personal actions only; though it is true, in many of these, no lien upon the wrongfully used thing is created. While the government has the *jus in re* with regard to all enemy property, it may exercise the corresponding remedy, the *actio in rem*, only against enemy property captured as prize; enemy property used, bought, sold or given for insurrectionary purposes; enemy property transported, etc., to or from insurrectionary districts, and enemy property classified as belonging to certain descriptions of enemies.

It has twice been judicially said that cotton belonging to insurrectionists in the late civil war, was confiscable by proceedings *in rem*, because of the nature of the property in its being conducive to the support of the enemy,¹ when it did not belong to any of that classification of enemies whose property the courts were authorized to proceed against, nor had been transported in contravention of the non-intercourse act, nor used for insurrectionary purposes, nor lawfully captured as prize. Being enemy property, it was doubtless subject to the *jus in re* vested in the government by the law of nations; but certainly that right could not be enforced by proceedings directed against such cotton, since Congress had not authorized such remedy in such case. Here is an illustration of the existence of the *jus in re* without the corresponding *actio in rem*.

On the other hand, Congress has sometimes made the mistake of authorizing the action in the absence of the right. Rather,

¹ Post, Chap. XXXV.

one should say, attempting to authorize: for no statute can constitutionally give such authority. As an instance, there may be cited the forfeiture prescribed against tracts of land without specified limit, because a small portion may have been used for illicit purposes: the forfeiture to be ascertained by proceedings *in rem*: which is found in the internal revenue laws.¹ There will be occasion, hereafter, to test other statutes authorizing the proceeding, by the touchstone, "Is there any *jus in re* or *ad rem*?"

Tested by this simple question, many tax forfeitures will be found to have been declared without warrant, since the right of the state is merely *ad rem*; and whenever courts have held, (as they sometimes have,) that an action against enemy property is against an offending thing, they must have lost sight of the fact that nothing can be such unless it be the instrument of the offense; and therefore confiscated lands would be condemned without any right *in re* at all, if proceeded against as guilty or offending property. Sufficient reason for the enunciation of the elementary principles of this chapter will be apparent upon examination of many forfeitures under the revenue, collection and navigation laws; and of many proceedings under state statutes.

¹ Post, Chap. XVII.

CHAPTER IV.

THE RES.

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§ 36. **Description of the Property Seized.** That against which the action operates must be a thing, distinct in idea from the person owning it. It must be a distinct thing susceptible of seizure and condemnation; but, as this distinct thing may be intangible, it may be susceptible of only constructive seizure. It may be of such a character that it cannot be taken into possession by the seizing power, except in such artificial way as the law recognizes to be a seizing, taking and keeping. Debts, obligations, various intangible rights, are such things as cannot be bodily seized and held; but they are susceptible of legal seizure, and may be proceeded against *in rem*.

The most common things operated upon by this form of action are vessels and merchandise, under the municipal law and admiralty. Vessels are usually described by name, to which may be, (and, if known, should be,) added the name of the owner, the number of tons-burden, and such other facts as may serve to make the description the more intelligible. It is common to add, in description of a vessel, "her tackle, apparel and furniture," though these form a part of the vessel, and would be included without the express addition. It is a venerable, old admiralty form, however, and might, in some cases, be found useful; as, for instance, a question might be raised with regard to furniture—whether it is a part of the ship? And even the sails and rigging, all the apparel, might be separate

from the hull of the vessel at the time of seizure, as would probably be the fact in case of the seizure of yachts, fishing smacks, etc.

Whether the action is against one thing, or one thing including one or more subordinate or auxiliary things, all understood as appertaining to the principal thing; or against two or several things; whether against corporeal or incorporeal things, there should be certainty as to the thing or things seized and held; since, manifestly, if the *res* should be wanting, there could be no action, the proceedings being not against any personal defendant.¹

The title of any cause, whether against a person or a thing, is a mere matter of convenience, and is no criterion by which to judge of the character of a cause. A case may be without any title at all.²

It is true that courts have sometimes alluded to the title of a case as indicating its character, but the title is no criterion by which to judge when the nature of the action is in dispute. While the want of proper averments in pleading cannot be supplied or eked out by the mere name given to the suit, the presence of proper averments cannot be avoided by a misnomer endorsed upon the papers. Indeed, the baptismal designation is often the work of the clerk of court; and, whether so or not, it forms no part of the pleading, and is not to be considered at all in ascertaining the nature of the thing which bears the name.

§ 37. **Presence in Court Actual or Constructive.** The action would cease at any moment should the *res* disappear. Smuggled liquors might evaporate between the time of their seizure and the time for condemnation or restoration: in such case the proceedings would be at an end for the want of a de-

¹ U. S. v. 84 Boxes of Sugar, 7 Pet. 453; 200 Chests of Tea, 9 Wh. 430; *McIlvaine v. Coxe's Lessee*, 4 Cr. 209; *Barancoat et al. v. Gunpowder*, 1 Met. 230; *Markle v. Akron*, 14 Ohio, 590, 591; *The Palmyra*, 12 Wh. 12, 13, 15; U. S. v. Bags of Coffee,

8 Cr. 398; *Pipes of Distilled Spirits*, 5 Sawyer, 421; *The Whisky Cases*, 99 U. S. 594; *Dobbins' Distillery*, 96 U. S. 395; *Three Tons of Coal*, 6 Bissell, 379; *The Confiscation Cases*, 20 Wall. 104, 105.

² Anonymous Case, 1 Gal. 23

fendant; as truly so, as though a defendant in a criminal prosecution should die while the action against him is pending.

Should the *res* be removed out of the territorial jurisdiction of the court where the action is pending, the proceeding could no more go on than they could against a runaway prisoner charged with murder. A necessary party would be wanting. The presence of the claimant would not supply the want of the missing defendant. But when the jurisdiction over the subject matter has vested by reason of the seizure, it is not every actual removal of the *res* that will divest jurisdiction. A seizure voluntarily abandoned by the government is a nullity;¹ and if the abandonment takes place before the filing of the libel, the court does not get jurisdictional power over the thing at all.² But a claimant could not divest the court of jurisdiction, when once acquired, by taking the *res* out of the territory of the district, even though clothed with the semblance of authority which an improvident judicial order of release can give.³ The libellants, in such case, may re seize the thing in another district, and sue there upon the judgment obtained when only constructive seizure was being maintained.⁴ This state of things will be discussed at some length in the next chapter, on seizure.⁵

Where a bond stands for the thing that was seized but has been released, the case goes on, as a matter of course, for there is a substitute for the original *res*.⁶ This is somewhat analogous to a criminal prosecution, when the prisoner is out on bail—though the analogy would be closer if the bail could stand trial and satisfy the law in place of the original defendant.

§ 38. **Presumption as to Forfeiture.** The thing must have been charged as forfeit, confiscate or delinquent, since the object of the action is merely to find out whether or not such is the case. The object of a criminal action is to find out

¹ The *Josepha Segunda*, 10 Wh. 312.

² The *Ann*, 9 Cr. 289.

³ The *Rio Grande*, 19 Wall. 178; *Ib.* 23 Wall. 458.

⁴ *Ib.*

⁵ §§ 42-54.

⁶ The *Blanche Page*, 16 Blatchf. 1; The *C. T. Akerman*, 14 Blatchf. 360; *Cargo of Schooner North Carolina*, 15 Pet. 40.

whether or not the accused is guilty, but he must be proceeded against as already guilty. That is the theory of the indictment. The arrest proceeds upon the assumption of his guilt. We need not confound the two presumptions: that of guilt and that of innocence. The presumption of the court and *petit jury* would be that of innocence, but the theory of the prosecution is based upon the presumption of guilt. This is exactly so when *things* are, by legal fiction, *accused* for *offenses*. They must be presumed innocent on the part of the tribunal, so as to throw the burden of the proof of guilt upon the complainant, (unless shifted, as hereafter to be seen,) but the proceeding is distinctly based upon the presumption of guilt.

So, when a thing is by fiction charged as hostile. The case goes forward on the presumption of hostility and consequent forfeiture, though courts must require proof, such as will show use by the enemy, or for the enemy; capture from the enemy; ownership by an enemy, or some other fact to fix clearly its *status* as a thing already of confiscable character, and only awaiting judgment of condemnation in a court of nations.

Where government has choice of actions by statute, either to proceed *in personam* for a penalty or *in rem* for a forfeiture, it depends upon the government's election whether or not there is presumption of forfeiture. Should the government decide to seek the penalty, it would thereby relinquish all right to aver a forfeiture based upon the one act done by use of the thing contingently forfeited. Should the government, on the other hand, decide not to sue for the penalty but to aver the forfeiture and seek to have the illegally used thing condemned as guilty, it would follow, (should there be condemnation,) that that thing had been in a forfeited state all the time since the committal of the offense. The complaint against it must be against a thing already forfeited; and there is no time when it became forfeit but the time when the offense was committed, and that was anterior to the government's decision as to which mode of redress it would pursue.

There are statutes among our revenue laws which give choice

of remedy such as above suggested; and there have been decisions thereunder sustaining the view here advanced.¹

There are also instances in which the government has choice of remedies under two or more different statutes, in which it is obliged to elect whether to proceed *in rem* or *in personam*. One statute may authorize the infliction of a fine upon a person for some illegal act; another may provide for proceedings against some instrument by which the illegal act is perpetrated, with the restriction that such proceedings should not be had if the offender be punished personally. Manifestly, here the action against the thing depends upon the decision of the government with respect to the personal action; and the *res* is not already forfeited, unless the government has declined to proceed against the offender personally, by affirmatively so declaring in some way, as by the institution of an action against the offending tool or instrument. Clearly, in such case, the election retroacts to the time when the offense was committed in, with, or by the thing, and that the presumption of its guilt antedates such election.

It is precisely such a case as when two remedies are offered in a single statute, but one of which can be adopted. There are many statutes which allow personal prosecutions without affecting the proceedings authorized by the same statutes against *things* for the same offense. The things are forfeited by the offense, and ready for immediate proceedings against them without regard to the personal actions for penalties.

§ 39. **Land as the res.** Real property, though often the object of suits *quasi in rem* to enforce mortgages, collect taxes, etc., has not frequently been made liable to condemnation as an offending thing. In England, land purchased by an alien, was forfeited to the crown, and such forfeiture might have been ascertained by proceedings *in rem*, had such been the provision of statute. So, for suicide and deodand, lands were forfeited; and the process for declaring the forfeiture judicially might have been such as to make the land the fictitious defendant,

¹ Caldwell v. United States, 8 How. 366; United States v. Grundy et al., 3 Cr. 337, (relative to Act of Dec.,

1792, on false oath to procure registry.) Fontaine v. The Phoenix Ins. Co., 11 Johns. 293, 300.

were it not for the obstacle that the *jus in re* would be wanting in the case of land forfeited for suicide, since real estate could hardly be *used* in the taking of one's life. The *actio in rem* was not resorted to in such cases. In this country, there are statutes under which land may be libelled as a guilty or offending thing, and condemned precisely like personal property.

Real estate, used for insurrectionary purposes, may be made the *res* in an action *in rem* by virtue of a statute of the United States. By the "act to confiscate property used for insurrectionary purposes," approved August 13, 1861, any property, whether real or personal, tangible or intangible, *used* for insurrectionary purposes; or bought or sold, acquired or given, for such purposes; by the owner, or his agent, or his employé, etc., if knowingly so used, sold, bought, acquired in any way, given, etc., was to be declared hostile, and to be condemned as forfeited. Land formed no exception, as, indeed, there is no reason why it should. A foundry engaged in moulding cannon for a domestic enemy, is used for insurrectionary purposes: a foundry consisting of the machinery, building and ground on which the factory stands. A prison used for incarcerating soldiers of the United States, for the purpose of promoting an insurrection, would properly be made the object of the *actio in rem* authorized by this statute, together with the ground necessary to its existence, on which it would be situate.

There were several actions instituted against land and the buildings thereon, under this act of Congress, during the late civil war, some of which found their way to the Supreme Court.¹ There was full recognition of the right to make land the *res* of an action *in rem*; to treat it as hostile by reason of its use; to treat it as a movable would be treated under similar circumstances; to treat it as having acquired the hostile character and become subject to the law of nations at the will of our own political power: not as forfeited for an offense under municipal statute.

The *status* of the *res*, as forfeited property, to be ascertained by the action enjoined by the statute, depends upon the

¹ Post, Chap. XXXV.

owner, whether he was an enemy or not, in the intentional use, or sale, or purchase, etc., of the thing itself: therefore, forfeiture under this act is analogous to that under the law of nations where ships, etc., are condemned for hostile use, deemed hostile ownership as to the thing used. A foundry with the ground on which it stands, might belong to one not in armed insurrection, yet be hostile under the act; and might therefore properly be made the defendant in the action presented.

Real estate, as well as all other species of property belonging to certain specified classes of insurgents, was, by the "Act to * * * seize and confiscate the property of rebels, * * *" (approved July 17, 1862,) relieved of the limitation which the modern practice of belligerents was supposed to have put upon war rights, and made liable to be proceeded against as the hostile *res*—the thing forfeited already by reason of enemy ownership.

As hostile ships might be captured by our navy, or seized by a civil officer and proceeded against as hostile, so now might property on land, or land itself, be captured or seized as the case might be, and condemned in a court of the United States clothed with the powers of the *jus gentium*. The act mentioned provided for *seizures*—not captures: but it partially removed the limitation, and gave the same rights of procedure in case of the *seizure* of hostile property on land or sea, as existed before in the case of the *capture* of hostile property upon the sea.

It is true that booty of war, captured by land forces, is not made the subject of judicial proceedings, though Congress might so make it. Should other nations adopt such conservative course, Congress probably would not be behind them. So far as the act mentioned goes, seizures of hostile property are to be followed by proceedings in court against it as forfeited for being hostile.

Congress left no room for doubt as to what was to be done with hostile property civilly seized. No alternative was offered. After making it the duty of the president to seize, it required the institution of proceedings *in rem* against it, and made it the duty of the courts to pronounce the condemnation

of the thing if found to be hostile by having belonged to an enemy.

The *res* is made perfectly plain in this statute. Repeated expressions illustrate each other: such as "enemy property;" "courts shall grant such orders, etc., as to convey complete title," etc., "seizure of all the estate and property," etc.; "to secure the condemnation and sale of any such property," etc., found in the fifth and seventh sections of the act.

From these and other expressions, and from positive provisions, it seems perfectly clear that the *res* under this act, may be: (1.) Real estate. (2.) Some interest in real estate. (3.) Personal property. (4.) Some interest in personal property. (5.) Some part or share of property real or personal. (6.) Some intangible right that can be only constructively seized. (7.) Finally, without further specification, the act covers all property or property rights that are hostile, belonging to the designated classes.

In any particular proceeding under this act, (as, indeed, under any other,) we are to determine what is the *res* by ascertaining what is seized and informed against. The *res* might be only the right of redemption of land sold for taxes, which hostile right would be seized, but not the land. It might be the "right, title and interest" of an enemy to land as residuary legatee; the right to a servitude, etc.

§ 40. "**Right, Title and Interest.**" The phrase, "right, title and interest," is broad enough to cover the entire ownership of property, real or personal; if, for instance, we speak of the right, title and interest of A. when the complete ownership is in him. Levy upon "the right, title and interest" of a defendant in execution was held, in Wisconsin,¹ to be a levy upon the land itself, for all practical purposes, and that a sale, under such levy, conveyed the land. And the same doctrine has been repeatedly held in Louisiana, where sale of "right, title and interest" does not limit the land sold to so much as remains after mortgage rights of others have been satisfied out

¹ Vilas v. Reynolds, 6 Wis. 214.

of it, but conveys the whole.¹ The mortgagee looks to the proceeds.

In cases, however, where "right, title and interest" is a phrase explained by the context to be something less than the land; and where the seizure is a constructive seizure, and is meant to secure some right or privilege, present or prospective, upon land, there need be no difficulty in so understanding it; nor would there be any great labor in collecting many decisions to show that, under such circumstances, it means less than the land itself.

The only true way of ascertaining what is the *res* in any given case, is to find *what* has been seized and informed against. For instance, if the question is whether life estate in a realty, or the fee simple, is the *res*, we must look to the seizure and information to see which is the thing proceeded against. If an incorporeal right to land is the subject of the action, the seizure would not be an actual taking of the realty into possession; it would be an artificial seizure. If the right of a tenant by curtesy should be forfeited, the seizure would be an actual taking of the land in possession, (for the tenant, being in possession, must be dispossessed, though he might remain on the land as keeper or by suffrance,) but the information would show that only the life estate is the *res*; and, should it erroneously show more, the claimant of the fee would easily be able, by showing his title, to prevent the condemnation of the land.

§ 41. **The *res* must be Something Subject to the Jurisdiction.** The *res* must be an actually seized or captured thing by a physical or artificial taking; a thing held in possession, actual or constructive; a thing already forfeited, and within the jurisdiction of the court. Captured upon the sea, seized even beyond the court's jurisdiction, and brought within the bounds of the court, property may be legally informed against; but municipal seizures, (though there are exceptional instances,²) must generally be made within the territorial jur-

¹ *Trudeau v. McVicar*, 1 La. Ann. 426; *Duchand v. Rousseau*, 2 La. Ann. 168, 173.

² *Church v. Herbert*, 2 Cr. 187; *Smith v. Del. Ins. Co.*, 3 Wash. C. C. 127.

isdiction. In all cases whatever, the court must have the thing in hand, actually or constructively, before it can proceed. Possession is far more important than the place and time and manner of the taking of possession.

The *res*, in the first stage of a proceeding, is that which is seized.

Secondly—It is that which is seized and libelled; and it is apparent that less may be libelled than what was seized: for instance, a ship may be seized, yet only a half-interest in the ship proceeded against.

Thirdly—The *res*, so far as the decree against it is concerned, is that which the court has jurisdiction to condemn. It would seem that there could be no difficulty in ascertaining what is the thing seized, libelled and adjudicated; yet, in practice, there has sometimes been difficulty. To name here but a single instance, (though many will hereafter be discussed,) the court of highest resort held, in one case,¹ (land itself having been seized, libelled and condemned,) that the *res* was a life tenancy carved out of the tenancy in fee of the land; though no such tenancy for life, nor tenancy for years, nor lease for a year, had been seized, or described in the libel, or mentioned in the decree. The reason given was that the court which had condemned the *res* had had no jurisdiction to condemn land, but should have confined itself to the condemnation of a life tenancy in the land. But this doctrine has since been expressly overruled on this point, and land held confiscable under the act the court were considering, so that nothing of title would be left in the former owner.²

¹ Bigelow v. Forrest, 9 Wall. 339.

² Wallack v. Van Riswick, 92 U. S. 202.

CHAPTER V.

SEIZURE.

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§ 42. **Essentiality of Seizure.** Seizure is the initial step in proceeding against a thing. What arrest is, in a criminal prosecution against a person, seizure is, in a prosecution against a thing. What citation is, in a personal civil action, seizure is in the *actio in rem*, so far as it is notice to all interested. It is absolutely essential to the existence of the action, to the jurisdiction of the court, to the validity of the condemnation.¹

Things already guilty of some offense are seized, just as persons supposed to be already guilty are arrested; and things hostile are, according to circumstances, either seized or captured, (capture being a method of seizure,) as persons hostile are either arrested or captured. And as the object of getting hold of guilty or hostile persons is sometimes nothing less than to destroy them for the good of society, so the object of getting things in hand is sometimes the same.

Without seizure, the change of title by forfeiture could not be judicially ascertained, as without due civil process a case of disputed title between two citizens could not be decided, unless the process should be waived by consent of the parties. In almost all actions against things, the object of the complainant

¹ The *Hibernia*, 1 Sprague, 78; La Jeune *Eugenie*, 2 Mason 409; The *Moses Taylor*, 4 Wall. 411; Parker

v. Overman, 18 How. 140; The *Fideter*, 1 Abb. (U. S.) 577; The *Steamship Fideter*, 1 Sawyer, 153.

is to have the change of title by forfeiture declared, and his right thus arising, decreed.

Things already indebted must be seized to have liens, etc., against them decreed and collected, just as personal debtors must be brought into court, in personal actions.

§ 43. **Insufficient seizure.** Where the seizure is insufficient, the regularity of the following proceedings will not avail to prevent the whole case from being inoperative; from being like a fabric without foundation, which must fall to the ground. A defective seizure cannot be made effective without the repair of the defects. To cure it, we must make it sufficient; the remedy must be administered to the seizure itself, so as to make it whole. So long as it remains insufficient, no pleading nor judicial order, nor even admissions by the claimant, which do not concede the legality of the seizure, can lead to lawful condemnation of the thing.¹

Let it be never questioned that proceedings *in rem* are void *ab initio* without seizure sufficient; that there is no reliable decision, and can be none, to the effect that insufficient seizure can be cured by anything less than the making of it sufficient.

After seizure and return, the *res* is in the custody of the court.²

§ 44. **An Executive Act.** Seizure is an executive act. When made pursuant to judicial order, it is still an executive act. Whether made under the laws of a State government, or those of the United States, or those of nations; whether made by sheriffs, marshals, naval officers, or private individuals, seizure is the exercise of executive functions.³ All Federal seizures are by the President of the United States, the chief marshal,

¹ The Collector, 6 Wheat. 194; Jennings v. Carson, 4 Cr. 2; The Eliza, 2 Gal. 4; The Hibernia, 1 Sprague, 78; U. S. v. Cook, Id. 213; Burke v. Trevitt, 1 Mason, 96; La Jeune Eugenie, 2 Mason, 409.

² Jennings v. Carson, 4 Cr. 2; Burke v. Trevitt, 1 Mason, 96; The Collector, 6 Wh. 194; The Seneca, Gilpin, 37; The Grotius, 1 Gal. 503; The

Monte Allegre, 9 Wh. 648; Hudson v. Gastier, 4 Cr. 293; The Nassau, 4 Wall. 634.

³ Miller v. U. S., 11 Wall. 292; Tyler v. Defrees, 11 Wall. 331; Taylor v. U. S., 3 How. 197, 205; The Caledonia, 4 Wheat. 100, 103. But, see Coppel v. Hall, 7 Wall. 542; The Reform, 3 Id. 617; The Ouachita Cotton, 6 Id. 521.

under whom all district marshals and other national officers act. All State seizures are by the governors of the States, each within his own territorial jurisdiction, through his subordinates, the sheriffs, constables and others.

Statutes, which make it the duty of the President of the United States to seize forfeited property for judicial condemnation, do not add to his duties, for such is his task by virtue of his office. He is bound to see all laws faithfully executed, (which means that he shall execute them,) whether enjoined to that duty in each enactment or not. What his subordinates lawfully do he does; and this is as demonstrably true in theory with regard to marshals and deputy marshals of districts, as it is of his immediate official family, the secretaries at the head of departments, and of military commanders, of whom he is chief.

Federal seizures are made by the president, just as seizures in England are by the crown; for, though here the president is the servant of the aggregate citizenship, in which alone rests sovereignty, yet he stands in the king's stead in our system of our law, adopted mainly from Great Britain. He, as well as the representative of the executive power in England, may take possession of property to which the government has no right, and which the courts cannot justly condemn; his seizure may be insufficient; but it cannot occur that his seizure shall be insufficient, because he is not the lawful authority to seize the thing legally seizable by the Federal Government. It is not necessary for the political power to tell him by statute what the constitution has already told him, and what he has sworn to do. Nor need State legislatures admonish governors that it is their duty under the organic law of the State to execute laws providing for condemnations for forfeitures, as well as any other laws.

Plain as it is, that the executive power is lodged in the president, and that he acts through others, the point has been made, from time to time, in cases under statute expressly requiring the president to make the seizure, that the seizure in such cases was invalid if not made at his particular instigation: just as though seizures by marshals under admiralty warrants

and other judicial processes, made even after the filing of the libel or information, were not just as much seizures by the executive as though made at his express instigation and before pleading filed.¹

Illegal seizures, however, are not presumably by the president; and the *onus* of proof would rest upon him who should try to shield himself under the executive for making a tortuous seizure.

§ 45. **Anybody may Seize.** Without official commission, without written warrant signed and sealed, without any knowledge of the will of the executive, without any complaint filed by the law officer, without any affidavit before any magistrate, anybody may seize for forfeiture.² He may take possession, if he can, of a guilty or hostile thing, and bring it to the knowledge of the law officer of his county, (or of his district, if the thing has become forfeit to the Federal Government;) and, if he is a citizen of the country, this action will sometimes be a duty resting upon him.

But, whether his seizure is to be deemed that of the chief executive or not, depends upon the ratification of his act by the attorney and the condemnation of the thing by the court. If so ratified the case may go on to the end—to condemnation and sale—and his act was, theoretically, instigated by the executive. Even if the result should be restoration to the claimant as owner, upon the decision that there had been no forfeiture, still the court ought to be authorized by law to award the protection of *probable cause*, and save the private citizen who seized as fully as though he had been the marshal of the district. But it has been held that “probable cause” cannot be certified, except when authorized by statute.³

Anybody may seize, but he does so at his peril. The rights of property are too important to be lightly dealt with. Free-

¹ Taylor v. U. S., 3 How. 197; Tracy v. Swartwout, 10 Pet. 80; Otis v. Walter, 2 Wh. 18.

² The Caledonian, 4 Wheat. 100; The Bolina, 1 Gal. 75; The Rover, 2 Gal. 241. And the adoption of his

act by the government will heal defects. 22 Pieces of Cloth, 16 Pet. 342; Taylor, Claimant of Cloths, etc., 3 How. 197; Cargo of Ship Emulous, 1 Gal. 563.

³ The Apollon, 9 Wh. 362.

dom from the annoyance of litigation is too precious a privilege to be disturbed without good cause. It would not do to allow every man to set himself up as a representative of the president, and to make himself a seizing officer, without the wholesome check which liability to damages imposes.¹ The man who wrongs another by seizing and reporting property as forfeited when it has not been forfeited, and when there was not even "probable cause" for his action; when the principal motive may have been malicious, (it is sufficient to the action for damages that the seizure was groundless,) ought to be mulcted in sufficient amount to repair the wrong done.

It is well settled by authority that any person may seize property for a forfeiture, and that his action will be deemed that of the executive power of the government, if proceedings be based upon it so as to adopt it;² as much the action of the government as though the seizure had been the result of a previous command. And condemnation relieves from liability.³

§ 46. **Liability for Seizure.** It is equally well settled by authority, that the seizure without the authority of the executive power, either previously given or retroacting by virtue of proceedings duly instituted, puts the party seizing in an indefensible attitude, in case of action for damages, after restoration.⁴

In *Gelston v. Hoyt*, it was held that the collector of the port of New York could not set up the forfeiture of a ship in defense of an action for damages against him in a State Court for its seizure and detention, because the judgment of acquittal

¹ *The Amiable Nancy*, 3 Wheat. 546; *Little v. Barreme*, 2 Cr. 179; *Maley v. Shattuck*, 3 Cr. 458; *Del Col v. Arnold*, 3 Dal. 333; *Talbot v. Three Brigs*, 1 Dal. 103.

² But, see *Winchester v. U. S.*, 14 Ct. Cl. 13, and *U. S. v. Winchester*, 99 U. S. 372; also, *Dow v. Johnson*, 100 U. S. 158.

³ *Blatch. P. C.* 64, 65, 89, 90, 306, 309, 561; *Roe v. Roe*, Hardr. 185; *Malden v. Bartlett*, Park. R. 105; *The Caledonia*, 4 Wheat. 100, 103;

Taylor v. The United States, 3 How. 197, 205, 206.

⁴ *Gelston v. Hoyt*, 3 Wheat. 246; *The Eleanor*, 2 Id. 345; *The Charming Betsy*, 2 Cr. 64; *Little v. Barreme*, Id. 170; *Maley v. Shattuck*, 3 Cr. 458; *Sharpe v. Doyle*, 102 U. S. 686; *Slocum v. Mayberry*, 2 Wh. 1; *Conrad v. Pacific Ins. Co.*, 6 Pet. 262; *Cardinel & Lusulsky v. Smith & Walden*, 1 Dedy, 197; *Hall v. Warren*, 2 McLean, 332; *The George*, 1 Mason, 24; *Burke v. Trevitt*, Id. 96.

of the ship in a United States Court was a decision that she had not been forfeited, and that it was *res adjudicata*, just as a judgment of condemnation would have been. And on this point Judge STORY, the organ of the court, cited several authorities, showing that, at that early day, it was well settled that condemnations *in rem* could not be inquired into collaterally,¹ and that the acquittal of a thing is also final, and cannot be reinvestigated in another suit.² He held that, by reason of the acquittal of the ship, Collector Gelston could not defend himself in the State suit for damages under the authorization expressly given to the several officers of customs to seize all vessels and goods liable to seizure by virtue of any act of the United States respecting the revenue, and where any breach of the laws of the United States has been committed.³ The evident reason why the collector could not shield his seizure under this authority was, that since the acquittal of the ship, he could not rightfully claim to have acted under this authorization, there having been no breach of the laws. The learned organ of the Supreme Court, however, does not seem to think that, had there been such breach, the custom officer would have been acting under the president's presumed direction in making the seizure; for, further on, in discussing the Act of Congress of 1794, Chap. 50, Sec. 7, which expressly authorized the president to use the army and navy to take possession and detain vessels fitted out to aid a foreign State, etc., when he shall find it necessary to do so, he says: "The argument is, that as the president had authority by the act to employ the naval and military forces of the United States for this purpose, *a fortiori*, he might do it by the employment of civil force. But, upon the most deliberate consideration, we

¹ Harg. Tracts, 467; Wilkins v. Despard, 5 T. R. 112, 117; Scott v. Shearman, 2 W. Bl. 977; Henshaw v. Pleasance, 2 W. Bl. 1,174; Geyer v. Aquillar, 7 T. R. 681; Meadows v. Duchess of Kingston, Ambler's Rep. 756; 2 Evans' Pothier on Obligations, 346-367.

² 12 Vin. Abrid. A. B. 22, 95; Slo-cum v. Mayberry, 2 Wheat. 1; Cook v. Sholl, 5 T. R. 255; The Bennet, 1 Dodson's Rep. 175, 180. See 3 Wheat. 316-322.

³ Act of Feb. 18, 1793, C. 8, § 27; Act of March 2, 1799, C. 22, § 70.

are of a different opinion." This would seem to imply that the chief executive's power of seizure is confined to express authorizations of statute; and that all lawful seizures by officers of customs and others are not constructively by his authority—which is not in conformity with what has been above stated. His remark on this point is a *dictum*, however, and not necessary to the court's decision as happily summed up by Mr. Justice JOHNSON.

Even the express order of the president would not protect the collector of customs or other officer from a suit for damages, in case the seizure made by the latter was unlawful, and the order given in violation or without the authority of law. Nor a naval officer, for illegal capture.¹

The measure of damages is the actual loss which the owner sustains by reason of the wrongful seizure and detention, when the element of malice forms no part of the wrong; but, in case of a malicious outrage in the way of seizure and detention, exemplary damages will be allowed.²

§ 47. **Probable Cause.** The rule that the person seizing does so at his peril, and is liable to the person injured, in case of injury, to the full amount of the damage sustained, whether actual or vindictive, under the law, applies to captors upon the high seas as well as to seizing officers and private persons making seizures upon land or water. It is the remedy which the law gives to those who have been wronged, and without such remedy there would be no adequate protection of private rights.

The exceptions to the general operation of this rule are found in statutes where the seizing officer, under certain circumstances, is amply protected. The certificate of probable cause, which the court not only may give, but, in the exercise of his duty, must give whenever the facts warrant it, and in all

¹ Little et al. v. Bareme et al., 2 Cr. 170.

² The Betsey, 2 Cr. 64; Canter v. American Ins Co., 3 Pet. 307; The George, 1 Mason, 24; The Anna Maria, 2 Wheat. 327; La Amistad

de Rues, 5 Wheat. 385; The Lively, 1 Gal. 315; Maley v. Shattuck, 3 Cr. 485; The Ulpiano, 1 Mason, 91; The Amiable Nancy, 3 Wheat. 546; The Apollon, 9 Wheat. 362.

cases of doubt¹ is a complete protection to the collector, surveyor, inspector, or any officer for whose protection it is lawfully given. But the certificate can be given only when authorized by statute.² Without such protection, it might prove difficult for the government to enforce its rights to the condemnation of property in any doubtful case. The officer, even where he would be entitled to a moiety of the thing to be seized in case of condemnation, might not deem it his duty to incur the risk of being mulct in damages, the half of which his government would not bear. And yet, it would manifestly be the duty of a collector of the port to cause the seizure in case he honestly believed the penalty of forfeiture had been incurred, especially if so advised by the district attorney. He should, in such case, do his duty, whatever the risk, or resign his office. He would, of course, have the benefit of the advice of the secretary of the treasury, in case there was sufficient time before the seizure, but even that, if wrongly given, would be no protection except so far as made such by statute.³

The duty of making seizure is often a very delicate and dangerous one, not only on account of the liability of being prosecuted for damages in case there should be judgment of restoration and a refusal of the certificate of reasonable cause, (which may be the result in consequence of an erroneous verdict and judgment when the seizure was really lawfully made,) but also because of the hazardous nature of the undertaking in many cases, putting the seizing officer in jeopardy of life and limb. To protect officers of the revenue, under such circum-

¹ *Stacey v. Emery*, 7 Otto, 642; *United States v. Riddle*, 5 Cr. 311; *United States v. Grundy*, (note) 3 Cr. 356; *The Friendship*, 1 Gal. 111; *Locke v. United States*, 7 Cr. 339; *The Ship Recorder*, 2 Blatchf. 119; *Stoughton v. Dimick*, 3 Id. 356; *The Brig Henry*, 4 Id. 359; *Clifton v. United States*, 4 How. 242; *Carrington v. Merchants's Ins. Co.*, 8 Pet. 495; 22 Pieces of Cloth, 16 Id. 342;

The Apollon, 9 Wheat. 362; *Sixty Pipes of Brandy*, 10 Id. 421; *The Palmyra*, 12 Id. 1; 26 Diamond Rings, 1 Sprague, 294; *United States v. One Sorrell Horse*, 22 Vt. 655.

² *The Apollon*, 9 Wh. 362; *United States v. Sherman*, 98 U. S. 565; *Schr. Abigail*, 3 Mason, 331. See *Imley v. Sands*, 1 Caines, 565; *Cox v. Barney*, 14 Blatch. 289.

³ *Tracy v. Swartwout*, 10 Peters, 80.

stances, heavy penalties have been prescribed by several statutes to punish those who resist his authority.

§ 48. **Protection of the Seizing Officer.** Protection to seizing officers of the revenue and their subordinates, is given by the act of 1799, (the Collection Act,) by which the person resisting is finable to an amount not exceeding four hundred dollars; and, if master of a vessel arriving into a United States port and hindering an officer of the revenue from boarding her officially, he is finable five hundred dollars, or less.¹

And, if any person should rescue, or attempt to rescue, any property seized by virtue of any revenue act of the United States, he is made liable to imprisonment not exceeding twelve months, and fine not exceeding three hundred dollars.² Double costs are awarded to the revenue officer when defendant in an action for damages, in case of the non-suit of the plaintiff, or of judgment for the defendant.³

“Every person who forcibly assaults, resists, opposes, prevents, impedes, or interferes with any officer of the customs, or his deputy, or any person assisting him in the execution of his duties, or any person authorized to make searches or seizures, in the execution of his duty, or who rescues or attempts to rescue, or causes to be rescued, any property which has been seized by any person so authorized, or who, before, at, or after such seizure, in order to prevent the seizure or securing of any goods, wares or merchandise by any person so authorized, staves, breaks, throws overboard, destroys, or removes the same, shall be fined not less than one hundred dollars nor more than two thousand dollars, or be imprisoned not less than one month nor more than one year, or both; and every person who discharges any deadly weapon at any person authorized to make searches or seizures, or uses any deadly or dangerous weapon in resisting him in the execution of his duty, with intent to commit a bodily injury upon him, or to deter or prevent him from discharging his duty, shall be imprisoned at

¹ Act of March 2, 1799; Act of Feb. 18, 1793; Act of March 3, 1823; Act of April 30, 1790.

² Act of July 13, 1866, C. 184, § 67; U. S. Rev. Stat. § 5446.

³ Act of 1799, § 71; U. S. Rev. Stat., p. 183, § 971.

hard labor for a term not more than ten years nor less than one year.”¹

The general scope of the section which we have quoted covers all officers of the customs, and their subordinates and employés, and all private persons lawfully assisting them. Inspectors are included in the term “officers of customs,”² and all weighers, gaugers, clerks, keepers, temporary laborers even, are sufficiently described in the foregoing section of the act of 1866.

To enforce the above and other penalties for resisting revenue officers and their lawful aids, a criminal prosecution lies against the wrongdoer,³ but it has been held that no indictment lies for resisting an inspector after the collector who appointed him has gone out of office;⁴ but the correctness of this depends upon the soundness of the doctrine advanced, (in the case in which this is held,) that all appointees of a collector necessarily go out of office with him.

The seizing officer, or any person seizing or capturing things for forfeiture, has further protection in the law of pleading, which throws the *onus probandi* upon the claimant as soon as probable cause has been established. And, in case of informers, or custom-house officers who are entitled to a part of the forfeiture, or captors who share in the prize, there is some remuneration for the risk taken when seizing at their peril.

An officer seizing in obedience to a writ issued to him, is usually safe in executing the process.⁵

§ 49. **Methods of Seizure.** Methods of seizure for forfeiture vary, as the things seized are different in their nature.⁶

¹ Act of July 18, 1866, C. 201, § 6, Rev. Stat. U. S., p. 1,055, § 5,447; United States v. Rineskoff, 6 Biss. 259.

² U. S. v. Sears, 1 Gal. 215.

³ U. S. v. Sears, 1 Gal. 215.

⁴ The U. S. v. Wood, 2 Gal. 361.

⁵ Underwood v. Robinson, 106 Mass. 296; Bird v. Perkins, 33 Mich. 28; Hill v. Figley, 25 Ill. 156; Wal- den v. Dudley, 49 Mo. 419; Lott v.

Hubbard, 44 Ala. 593; Gore v. Mas- ter, 66 N. C. 371; Seekins v. Goodale, 61 Me. 400; Watson v. Watson, 9 Con. 140; Erskine v. Hohnbach, 14 Wall. 613.

⁶ The Schooner Silver Spring, 1 Sprague, 551; Hall v. Warren, 2 Mc- Lean, 332; United States v. One Case of Silk, 4 Ben. 526; The Josefa Segunda, 10 Wheat. 312; Pelham v. Rose, 9 Wall. 103.

As, in personal actions in which property is seized, the method is different when a corporeal object is taken, from that when an incorporeal thing is the subject of the taking, so, in actions *in rem*, like distinctions prevail. The seizure of a tangible article of personal property should be by taking it into physical possession and keeping it uninterruptedly. The seizure of intangible property, such as railroad stocks, bank stocks, etc., may be made by the service of notice of seizure upon the custodian of the stock, who is usually the president of a company, describing the shares by number or such other description as shall be sufficient to designate them. If certificates of bank stock or other stock can be found, they may be taken into actual custody, though that would not be the legal seizure of the incorporeal rights which they evidenced, without notice to the president, cashier, or whomever may be the proper custodian before the seizure.

The method of seizing all incorporeal hereditaments, all intangible things, necessarily varies according to the character of the right or interest to be secured. The best rule is to give such notice to the person in control of such property as to prevent him from transferring, or allowing the owner to transfer such property, stating to him that it is seized, and reporting the seizure to the court directly, when information has already been filed; or to the law officer of the government, when seizure is to precede pleading. The best that the circumstances admit of is always a good seizure, if the intangible thing is liable to be seized at all.

To seize real estate, notice of seizure must be served upon the tenant in possession; and, as such property is immovable, (as always technically styled in the civil law,) there is no danger of its running off or being spirited away, and, therefore, no keeper is necessary. Real estate may be seized and held without actual entry upon the land.¹ Should buildings be upon the land, however, and found either vacant or in charge of untrustworthy tenants, it might become necessary, in the

¹ *Emerson v. Upton*, 9 Pick. 170; *Pick. 402*; *Taylor v. Mixer*, 11 Pick. 341; *Perrin v. Leverett*, 13 Mass. 128
Ashmun et al. v. Williams et al., 8

exercise of common prudence, to put some one in charge. Where anything less than the fee simple title to real estate is seized, the notice should specify the right sought to be condemned and sold, as otherwise the seizure of the land in a proceeding *in rem* would, if resulting in condemnation before a court of competent jurisdiction over the subject matter, take away the whole property from the owner forever.

Admiralty seizures are usually made under a warrant issued by the court; and vessels, etc., must be physically seized and placed in the charge of a keeper, as in the case of all movable property.

The method of seizure must be such as is required by State statutes, which varies in different States, and the Federal courts are obliged to conform to State law, in this respect, when it is not in conflict with some act of Congress.

Great delicacy should be observed on the part of seizing officers, that they do not unnecessarily offend the sensibilities of innocent persons, whose houses or ships may be liable to search under the very extensive powers given to such officers. As the power is great, it should be exercised with great caution. Ships may be boarded, if a collector, surveyor, naval officer, or any person specially appointed for the purpose, "shall have reason to suspect"¹ that any goods subject to duty are concealed thereon; and they may be searched, and the goods seized. And any one of those officers may, upon like suspicion, enter a dwelling house, (or other private building,) and search and seize, if armed with a warrant from a justice of the peace.² And even travelers and their baggage may be searched pursuant to regulations prescribed by the secretary of the treasury.³ Internal revenue officers may also make searches and seizures of like nature under a search warrant.⁴

Force may be used when there is resistance to search or seizure; and the measure of the force is the strength of the opposition. To the extent of the whole power of the govern-

¹ Act of 1866, U. S. Rev. Stat., § 3,061.

³ Rev. Stat. U. S., § 3,064.

⁴ Rev. Stat. U. S., § 3,462.

² Rev. Stat. U. S., § 3,066

ment force may be used, when necessary, for the execution of the laws.

§ 50. **Time of Seizure.** The *time* of seizure, with reference to prescription, depends upon statute. The general rule is that the action *in rem* for forfeiture is prescribed in five years;¹ and it is provided that the person of the offender, (that is, in case of a personal action for a penalty,) or the property liable to penalty or forfeiture, must be within the United States during this period of limitation. If absent during the time, or any portion of the time, prescription would be interrupted, and the absence would be deducted in counting the five years, and other rules of law applied, as in case of the limitation of personal actions.

The rule (Rev. Stat. U. S., § 1,047,) applies to personal actions for penalties as well to actions *in rem* for forfeitures. The *proviso* may possibly prove misleading, as it is as follows: "*Provided*, That the person of the *offender*, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property." The context, however, explains sufficiently the meaning of the legislator, since the section above the *proviso* treats of persons liable to penalty for violation of revenue laws as well as of things liable to condemnation. And the word "or" in the proviso is significant of the intent that either the person liable to prosecution in the one case, or the thing liable to condemnation in the other, may be proceeded against at any time within five years; and that, if either be out of the country so as to prevent process, in either case, then the running of the time of limitation should be stopped during such absence.

The limitation of five years is confined to revenue cases. There is no limit to the action against hostile property, and it may be seized or captured at any time during the continuance of hostilities. Peace puts an end to such arrests, so

¹ Act of Feb. 28, 1839, § 4; Act of March 2, 1799, § 89; March 26, 1804, § 3; April 20, 1818, § 9; March 3, 1863, § 14; July 25, 1868, § 1; U. S.

Rev. Stat., § 1,047; *Stimpson v. Pond*, 2 Curt. C. C. 502; *United States v. Norton*, 91 U. S. 566.

that a vessel for breaking a blockade could not be captured at sea, nor seized if found in port, after the date of the commencement of the peace, when the war is one between two nations.

Admiralty seizures to enforce liens are governed by maritime law, qualified often by special laws creating liens and privileges, etc., which will be noticed when we come to treat of those features of proceedings *in rem* which are peculiar to admiralty; but revenue forfeitures on the admiralty side of the court, as well as those on the law side, are governed by the rule above mentioned, from the revised statutes.

The *time* of seizure, with reference to the proceedings, is prior to the filing of the information. The seizure is the initial act; it is that which gives the court jurisdiction. It is the first step in the logical order of the proceedings. It must precede the information given to the court and to the world, because the fact of seizure is an essential averment of the information. Courts have no authority to order the arrest of a thing before they are informed of the charges against it, made under oath, or made by a sworn officer. The district attorney, being a duly qualified officer, makes his information under his official oath; and though he does not swear from personal knowledge of the particular case, yet his allegations make such *prima facie* showing as to authorize the court to act; for instance, to issue the admiralty warrant in maritime causes, under which the marshal takes possession of property previously seized by some other person. Of course, in many admiralty cases, where the action is a mixed one; for instance, against a steamboat, captain and owner, the libel may precede seizure.

Captures of prizes always necessarily take place before the filing of the libel; and the seizure of enemy property under the confiscation laws enacted during the late war were made by marshals under the order of district attorneys prior to any court proceedings, in accordance with a printed circular of instructions given by the attorney general.¹

¹ The jurisdiction of the district court does not attach under Section 9 of the Judiciary Act of 1787, un-

less there has been seizure before the institution of an action *in rem*. The *Fideliter*, 1 Abbott's Rep. 577. Seiz-

The *time* of seizure, in other respects, is not very important. The arrest should be by daylight, though imperious necessity would justify taking by night. Sundays and holidays should not be selected as the time for seizure in cases where other days would serve just as well. But an injudicious selection of time on the part of the seizing officer would not invalidate his action.

§ 51. **Place of Seizure.** The place of seizure is not confined to any narrower bounds than the district itself. Indeed, the seizing ground is much wider than the district, for arrests of things for condemnation may be made anywhere throughout our unorganized territories, and the property may be brought into some United States district, either within a State or an organized territory. And as our district courts, when sitting in admiralty, are courts of nations, and have jurisdiction over the seas in common with like courts of other countries, seizures may be made upon all public waters, and the things seized brought into any district so as to give, by such importation, exclusive jurisdiction to the Federal court of that district.¹

The place of seizure determines the character of the proceedings as to whether they are at law or in admiralty. When it is the sea, or water navigable from the sea by vessels of ten tons burden, the proceedings are in admiralty; when it is land, they are on the common law side of the court, and are like the English exchequer suits.

The place, with regard to the extension of the jurisdiction, from the sea shore, three miles, (a marine league,) or the dis-

ure must precede, under all laws of navigation, impost and trade. *Ib.* As a general rule, seizure should always precede the filing of the information. *The Ann*, 9 Cr. 289; *Silver Spring*, 1 Sprague, 551; *The Octavia*, 1 Gal. 488; *The Josepha Segunda*, 10 Wh. 312. Seizure is necessary to bring the property within the limited jurisdiction of the inferior Federal courts. *Keene v. U. S.*, 5 Cr. 305; *Conk. Treat.*, 254;

Kempis v. Kennedy, 5 Cr. 185; *Turner v. President, etc.*, 4 Dal. 8; *McCormick v. Sullivan*, 10 Wheat. 199; *Hodgson v. Bowerbank*, 5 Cr. 303; *Capron v. Van Norden*, 5 Cr. 126; *Sullivan v. Fulton St. Bt. Co.*, 6 Wheat. 450.

¹ *Church v. Hubbard*, 2 Cr. 187; *Rose v. Himely*, 4 Id. 241, 279; *The Ship Richmond*, 9 Id. 102; *The Apollon*, 9 Wheat. 362; *The Marianna Flora*, 11 Id. 1; *The Merino*, Id. 391.

tance of a cannon shot, must be qualified now so as to strike out the alternative, since the date of our improved ordnance by which a ball may be thrown twice that distance. We are not to understand that Mr. Krupp, by his improvement in great guns, has enlarged the territorial jurisdiction of countries bordering on the sea, till such extension shall be agreed upon by the family of nations. In the meantime, however, we may conclude that, by reason of these improvements which give a greater actual command of the sea from the shore, the tendency is to enlarge rather than to lessen the jurisdiction, and courts should now give a liberal construction where jurisdictional questions of this character arise.

The place of seizure may not only be without the limits of the exclusive territorial district in which the libel is filed, but the place of keeping the thing seized may even be within the port of a friendly power—especially a naval prize. The thing may never have been brought within the district—within any part of the United States—and yet the admiralty court would have jurisdiction upon the statement of the libellant, duly made, that the *res* had been taken on the high seas and carried into a friendly port, and is there still held for the use and behoof of the libellant. It is thus constructively in the possession of the court and subject to control, since the duties of comity, as recognized among nations, would require the neutral power to respect our rights over the thing temporarily held within the foreign jurisdiction.

There are many instances where it would be very inconvenient, if not impossible, to transport the *res* to the district where it is to be libelled. It might be a ship in such sinking condition that it could not be moved, yet it might be of some value. It might be goods of far more value in a foreign port than they would be if brought home; and, in such case, they had better remain there till condemnation, so that they can be sold there; or, if restored, that the owner may have the benefit of the good market without the expense of exporting them again.

Thus, though the presence of property gives jurisdiction

over it,¹ (though not over all interests in or to it, if notice be wanting,) yet that presence may be merely constructive, for the important requirement is that the court have power over the thing which is the subject matter of the action.² And courts have exercised jurisdiction on the legal assumption that they had prizes of war under their control, when those prizes were literally lying within a foreign port.³ An American vessel, seized by the French for breach of a municipal law of France, and carried into a Spanish port, may, while lying there, be lawfully condemned by a French tribunal, sitting in a French port.⁴

Notwithstanding the latitude given by the law as to the place, it is the duty of the seizing officer, under the 22d Admiralty Rule, to state the place as accurately as possible.

§ 52. **Place of Keeping.** The place of keeping the seized thing may be that of the seizing officer's hands constructively only; for the *res* may be money in bank under the literal keeping of the banker, and C. J. Taney said (where it was money deposited in the United States Treasury,) that the court might "always proceed *in rem* whenever the prize, or the proceeds of the prize, can be traced to the hands of any person whatever."⁵ But, as a matter of course, the funds must be under seizure, and under the control of the court. The possession of the third person is for the marshal; and, therefore, in a legal sense, it is by the marshal.

Ships, vessels, boats, many descriptions of merchandise, are often sold by order of court while proceedings are pending; and that, too, without the assent of the claimant, in case the thing is of a perishable or deteriorating nature. In such cases, the marshal usually deposits the proceeds in bank; and though they are then in the immediate keeping of the banker, they

¹ Parker v. Overman, 18 How. 140; Clark v. New Jersey Steam Navigation Co., 1 Story, 541; Manro v. Almeida, 10 Wheat. 473; Monroe v. Douglas, 4 Sandf. Ch. R. 182; Miller v. U. S., 11 Wall. 292; Tyler v. De-frees, 1b. 331.

² Grignon's Lessee v. Astor, 2 How. 319, 338.

³ The Henrick and Maria, 4 C. Rob. 43, 63.

⁴ Rose v. Himely, 4 Cr. 293.

⁵ Jecker v. Montgomery, 13 How. 515.

are as fully under the control of the depositor as in case of any private person who puts his money in bank.¹

§ 53. **Incidental Divestment of the Res.** The case of *The Rio Grande*² presents some curious facts concerning the possession of the *res* by the court. The vessel had been seized and libelled in the District of Alabama. There was judgment of restoration, and the court improvidently gave an order for the release of the vessel. Under this illegal mandate, (which the marshal was bound to obey,) the vessel was released and taken out to sea. But, within the legal delay, the libellants appealed the case to the Circuit Court; and the Circuit Court, in due time, condemned the vessel, though it was not actually in the possession of the court. The libellants, thereupon learning that the *Rio Grande* was at New Orleans, instead of executing upon her there the sentence of the court in Alabama, re-seized and re-libelled her, not only for the original indebtedness, but also for the costs incurred at Mobile, both in the District Court where she had been acquitted, and in the circuit, where she had been condemned in her absence. The District Court of Louisiana rendered a judgment of acquittal: the Circuit Court, upon appeal, condemned the vessel, as it had been condemned by the Circuit Court when sitting in Mobile, Ala. And, although the case came up *de novo*, the proceedings in Alabama were exhibited to the court, and judgment against the vessel for all the costs made in Alabama was awarded. Thus, the judgment of the Circuit Court, sitting in Alabama, was both regarded and disregarded at the same time. In the Supreme Court, the question of the appealability of the case turned upon those costs—whether they eked out the demand so as to make \$2,000—and the appeal was sustained. The only matter that makes reference to this case proper in this connection, is the place of the *res* when condemned in Alabama. Jurisdiction had been acquired by the original seizure; and certainly it had not been lost by the illegal order

¹ *La Jenne Eugenie*, 2 Mason, 409;
Fifteen Empty Barrels, 1 Ben. 125;
One Case of Silk, 4 Id. 526.

² *The Rio Grande*, 19 Wall. 178,
and 23 Wall. 458.

of release and the release thereunder, so far as to have prevented the marshal, under a revocation of the release order, to have taken her again into his actual possession, and held her, not as under a new seizure, but as under the old. When the vessel had gone out of the district, out to sea, then into another district, into the possession of another district marshal, whose seizing and holding have been sustained by the Supreme Court, could she be still in the constructive possession of the Alabama marshal? And if not, was she so when the Circuit Court there condemned her? And if that condemnation was an absolute nullity by reason of the non-possession of the *res*, constructive or actual, how could the costs there made become legally chargeable to the vessel? The *place* of the *res*, whether constructively in Alabama while really in Louisiana, presents a curious question, as reported. Certainly the steamer could not have been constructively, any more than actually, in two places at the same time. If the jurisdiction in Alabama was lost when the vessel was released under judicial order; and if the further proceedings in the Circuit Court there were null, and if the libellants had abandoned their case there and brought a new case in the Louisiana district under a new seizure, the owners of the vessel, in the new case, might have pleaded the acquittal by the District Court of Alabama as *res adjudicata*.

But, fortunately, the Supreme Court reporter, in stating the case, has mentioned that the libel in Louisiana stated the former condemnation in Alabama, and that the proctors attached a transcript of the record in that case, and made it a part of their pleading. The case is clear enough, if the new proceedings were a suit based upon the judgment already obtained, with no other object than the execution of that judgment. It is well settled that one admiralty court has jurisdiction of a libel to carry into effect the decree of another admiralty court; and the grounds of the decree ought not be inquired into by the court in which it is thus sought to be enforced.¹ And the reason given for not investigating the

¹ Penhallow v. Doane, 3 Dal. 54; Ocean Ins. Co. v. Francis, 2 Wend. 64.

grounds of the decree is, that the sentence *in rem* is good against the world. The claimants should have appealed from the Circuit Court which, in Alabama, condemned their vessel, if the amount in litigation would have warranted it. The district judge in New Orleans should not have entertained their defense there, much less have ordered restoration.

The question of the possession of the *res* is, under this view, easily solved. Considering that this was a case of seizure for material furnished and repairs, the vessel was lawfully held by the libellants from the date of the first arrest, through the agency of the marshal. When the latter let her go under an illegal order, the libellants were not legally divested. When they took her in hand again, through the agency of the marshal of the District of Louisiana, they merely recovered the actual custody of what they constructively held through all the time. And the suit upon the decree already obtained in another district presents no more difficulty than a suit *in personam* against a debtor in one State upon a judgment previously obtained in another. Nor does the admiralty jurisdiction of the courts of the two districts present any greater difficulty than the law jurisdiction of two judges, in different States, under such circumstances.

It was held, in *The Little Charles*,¹ that after a vessel has been seized and libelled, and a forfeiture claimed, the court does not lose its jurisdiction to condemn the vessel, by losing possession of it. But this would not be true, should the entire possession, constructive as well as actual, be lost; and the learned judge could not have meant that his decision should be stated so broadly. The *res* must always be, "in legal contemplation, in the custody of the court,"² and it cannot be withdrawn but by some one who shall establish a right to receive it.

§ 54. **Abandonment.** But, as a matter of course, the seizure may be abandoned. Failure to follow up the arrest by filing a claim in the District Court, before a hearing on the

¹ *The United States v. The Little Charles*, 1 Brock. 348.

² *The United States v. La Jeune Eugenie*, 2 Mason, 409.

merits, and by insisting on the benefit of the seizure, is an abandonment.¹ A seizure voluntarily abandoned, loses its validity, and no jurisdiction attaches to the court.²

But there must be an unequivocal act of dereliction to constitute an abandonment of seizure. The *Abby*, (case above cited,) after having been seized at sea, was entrusted to the master who had promised to take her into port, under the direction of the seizer. Although the captor withdrew his crew, and the ship was brought in under these circumstances, it was held that the seizure had not been abandoned.

¹ The *Josepha Segunda*, 10 Wheat. 325; *Hudson v. Guestier*, 4 Cr. 293.

² *Id.*; The *Abby*, 1 Mason, 361; The *Ann*, 9 Cr. 289; *Claiborne v. Stewart*, 60 Tenn. 206; *Masson v. Anderson*, 59 Tenn. 290; *Banks v.*

Banks, 77 N. C. 186; The *Sloop Abby*, 1 Mason, 360; *Hall v. Warren*, 2 McLean, 332; *Slocum v. Mayberry*, 2 Wheat. 1; The *Josepha Segunda*, 10 Id. 312.

CHAPTER VI.

THE LIBEL OR INFORMATION.

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§ 55. **Title of Proceedings.** The charge against the *res* is called the complaint, or the information, or the libel, or the libel of information. The practice has usually been to use the term *libel* when speaking of the charge in Admiralty cases; and either *complaint* or *information* in revenue cases and other cases *in rem* on the law side of the court; and the term "libel of information" was adopted in the confiscation cases for the forfeiture of the property of the domestic enemy during the late war.

All of these terms are sufficiently appropriate, and all mean the same thing. *Information* and *complaint* might be called *libel* without violence. *Libel of Information* is a good combination for the initial pleading which was required by the statute of July 17, 1862, "to conform as nearly as may be to proceedings in admiralty and revenue cases." It was used by District Attorneys in different states, and the Supreme Justices wrote of it without objection, though they sometimes said it should have been called simply an *information*. Conkling, in his Treatise, sometimes uses the term, "Libel of information." The use of any one of these terms, however, in making the charge against a thing, could not be fatally wrong. Indeed, it has been held that a libel on a seizure in the admiralty is, in its terms and essence, an information; and that the word "information" is not exclusively applicable to common

law proceedings.¹ The term "Libel of information," has been employed by the Supreme Court.²

The admiralty libel might be called a *complaint* without harm to the action. All three of the terms, employed in different classes of actions *in rem*, might be discarded, and other designations substituted, with no worse result than to create a little confusion in the minds of the judges and lawyers, after centuries of a different usage. By whatever term the declaration is called, it is, in all proceedings *in rem*, properly expressed by the general term *libel of information*.

§ 56. **Institution.** The proceedings, in government cases, are instituted by the United States Attorney for the District, whose duty it is to institute the action upon seizures reported to him, in all cases in which he deems it to the interest of the government, and consonant with law. The government, however, is not confined to the agency of this law officer, but may employ some other person learned in the law to conduct its causes. In prize cases, the government's attorney, in England,³ represents the captors too, and such was the invariable practice in some of the districts during the late war: the captors being represented thus without charge to them, except as the costs came out of the general fund, upon the distribution of the proceeds; and the attorney's fees made part of his compensation as limited by law, without extra compensation for representing the captors. In New York, and perhaps in other Districts, the prize libels were filed by proctors for the captors. Judge STORY has suggested that when the libel is filed by the government's attorney, the court may appoint a proctor to represent the captor, in his absence. This, however, would only be necessary in case of conflicting interests. Of course, the captors may have proctors of their own, if they choose; and so may informers and officers of customs, in revenue cases.

In cases of a private character, (that is, those in which the government is not the complainant, nor any state, city corporation or other political body,) the proceedings are instituted by

¹ The Samuel, 1 Wheat. 9.

³ The Elsebe, 5 C. Rob. 173.

² 22d Ad. Rule.

any attorney-at-law, and they go on in the same way as government causes. An oath to the information is required in all cases where the proceedings are instituted by one who is not a sworn officer; and it should be made by the party complaining, or his duly authorized agent in such case of necessity as his unavoidable absence.

The libel should be addressed to the court; for instance: "To the Honorable the Judge of the District Court of the United States of America, for the Southern District of New York." It is always better to give the full name of the country; and it should not be omitted when the court is sitting as a court of nations. There are other united states and provinces besides ours, and our full designation should be given.

In a State court, the address should give the full title of the court, in accordance with the usage there; and, in all courts, the names of the judges may be written in the address, though that is not always found to be the better practice. The address, however, does not differ from that in personal actions.

§ 57. **Necessary Averments.** The first important statement is that of the seizure. It must be alleged clearly, unequivocally, with absolute certainty. The date should be given, but it is wise to say "on or about" that day, for such would be sufficient, and it might save subsequent trouble. The time should not be too indefinite, so as to hinder such claimants as may come forward, and so as to render the information vague, uncertain and inartistic.

The place of the seizure should be set forth¹ to show that it was within the territorial jurisdiction of the court,² to show whether it is in the admiralty or at law, and to give all persons who may be interested necessary information. The more definitely and pointedly the place is stated, the better is the pleading, provided the exact scene is known, but it would be well to add "or thereabouts," or some other saving qualification, if there is doubt; but the territorial jurisdiction must be affirmed without any such qualification, as a matter of course.

The person making the seizure should be named, with his

¹ The Sarah, 8 Wheat. 394.

² The Hornet, 1 Crabbe, 426.

official designation, if he has any; and it should be stated that he acted in the name and behalf and on the authority of the United States of America, if the government is the complainant. No informer's name need be divulged; but under statutes which give him the right to proceed jointly with the government, as under the act of August 13, 1861, "to confiscate property used for insurrectionary purposes," he may be made a co-complainant; and it would not hurt any information to have his name divulged, though it might hurt him.

The jurisdiction of the court over the thing seized within the district, or brought into the district, should be fully alleged.

The right of the complainant to the thing should be set forth; the offense done in, with or by the thing, or the hostile character of the thing, should be particularly averred, so as clearly to establish the *jus in re*.

The thing itself should be well described,¹ and the name of its owner may be inserted for the purpose of description, if he is known. However, it is not necessary to the validity of the proceeding that the owner's name should be stated. It is very common, particularly in informations against smuggled goods, to add after their description, "belonging to some person or persons unknown." It would be better, after having stated the offense by which the title to the goods was charged, to add to the description of the goods, "lately belonging," etc. Indeed, if it should be stated that they had been abandoned before the offense, it would not affect the validity of the pleading, as the action is not against any person.

Where the owner is known, give his name in the complaint, for frankness sake; put him upon his guard, and give him a chance to defend his property. Such an averment, followed by a monition with his name in it, would give the owner less cause of dissatisfaction at the loss of his property.

The description of the thing seized should be such as fully to designate it. This purpose is the better effected if, for instance, after describing the *res* as "one hogshhead of sugar,"

¹ *Lawler v. Whetts*, 1 Handy, 29, (Mortgage Seizure;) *The Schr. Hop-pet*, 7 Cr. 389.

we add the mark upon the hogshead. Sometimes there are several seizures made at or about the same date, and of articles similar, such, for instance, as barrels, and, in such case, the description in the information would be much improved if we add not only the contents of the casks but also the inscriptions usually found upon them; thus: "Sixteen barrels of white wine, marked '*Vinegar, IXL.*'" "Five hundred boxes of cigars, marked '*Conchas, Havana.*'"

§ 58. **Owner's Name used to Describe Property.** The date of seizure, the place of it, the vessel in which forfeited goods have been imported, etc., all serve the purpose of description, but the name of the late owner is one of the best means. The only use of naming the late owner at all, is the description of the thing forfeited. In all cases the information need only say, "lately belonging to some person or persons unknown." In proceedings *in rem* for declaring the confiscation of land, the name of the person who owned prior to his forfeiture of it need not be stated in the information, except by way of describing the land, in addition to the giving of the metes and bounds.¹

Mr. Justice STRONG said, in *The Confiscation Cases*, (just cited,) that "liability of the property seized to confiscation, is the only subject of inquiry. No judgment is possible against any person. The enactment of Congress was, that property belonging to any one embraced within several classes of persons should be subject to seizure and condemnation. Persons were referred to only to identify the property." Of course, in order to show that the property was liable, it was absolutely necessary to prove, upon the trial, that it had been the property of some person or persons within some one of the classes of enemies designated by the act of Congress: but, for the purposes of correct pleading, the name of that person was not at all important, except as an additional means of identifying and describing the property forfeited. The information against Slidell's land would have been good, so far as description is concerned, if the quantity, the locality and the metes and bounds had been given, (as they were,) in the usual man-

¹ Slidell's Land, (*The Confiscation Cases*,) 20 Wall. 105.

ner of describing real estate, (so as to completely distinguish it from all other land,) without any mention of the owner at all. "Belonging to some person or persons unknown," would have been sufficient, with the allegation that such "person or persons unknown" belonged to one of the designated classes of enemies named in the act. The fact that the information in the case we are discussing described the property as belonging to Slidell, did but make the description better than it would have been under such language as "belonging to John Slidell, or to some person or persons unknown."

Though the description was better, the pleading was not. It would have been preferable pleading, had the alternative been given; for, had there really been some other owner, the description would not have fully designated the property, though there would have been no fatal error. Of course, in real estate descriptions, the ownership is of comparatively little importance, since the metes and bounds, or number of section, etc., must be given; but, in describing personal property, such as smuggled cigars, it is hardly safe to say, "lately belonging to A. B.," without adding "or to some person or persons unknown." We do not mean that the definite statement of the late ownership would be so unsafe as to prove fatal if false, but merely that it would fail of description thus far; other features of the *res* would be likely to make it recognizable.

One reason why the alternative had better be used, or the name altogether omitted, is the disposition of superficial reasoners to confound actions *in rem* with actions *in personam* whenever they can find the least hint of a person in the pleading. Such confounding has led to great mischief and resulted in great wrong to litigants.

§ 59. **Charge should be Certain.** The charge of guilt against the thing must be certain and without any alternation. So must the charge of hostility. So, also, the charge of indebtedness. Whichever of the three grounds is made the basis of the action, it must be alleged without any disjunctive assertion. The property must be alleged to have been forfeited because it is *guilty* by reason of some use made of it. If it is *hostile* property, the necessary charge to be unequivocally made against

it, is that its owner is an enemy. We may charge under the confiscation act of 1861, that it was used by an enemy, which is equivalent to the charge of enemy ownership. But *hostility* must be distinctly and unequivocally, and not alternately averred. Whether in a case of *guilty res*, or of *hostile res*, the fact of forfeiture must be averred. In case of property *indebted*, the *jus ad rem* should be distinctly and unequivocally stated, such as the contract creating the property obligation, the wages due by seamen for which the law gives a lien, etc. In a word, the distinct grounds should be set forth with certainty.¹

§ 60. **Libellant not Confined to the Grounds of Seizure.** This ground, or these grounds, need not necessarily be those upon which the seizure was made.² The attorney must set forth valid ground, or grounds, in his information, however much the seizing officer may have mistaken law. The setting forth other grounds does not invalidate the seizure made on unjustifiable reasons.

But if the seizure was made on land, it cannot be alleged to have taken place on water; such an allegation would have to be amended, or the information would be dismissed.³

Though the pleader need not state any fact that would avail the claimant,⁴ unless it should be necessary to the information, yet the offense itself, (when proceeding against things forfeited for guilt,) should be substantially and clearly stated: for the decree must be in accordance with the allegations; and we cannot be allowed the necessary proof without such allegations.⁵

No decree can be based upon a libel that is defective in essential matters.⁶ But a defective libel may sometimes be amended by leave of court.⁷

¹ The Brig Caroline, 1 Brock. 384; The Brig Caroline, 7 Cr. 496; The Schr. Hoppet, Id. 389; The Schr. Anne, Id. 570; Goodwin v. United States, 2 Wash. C. C. 473; The Mary Ann, 8 Wheat. 380; The H. P. Baldwin, 2 Abb. (U. S.) 257; The Steamboat Transport, 1 Ben. 86; The Bark Havre, Id. 295.

² Taylor v. United States, 3 How. 197.

³ The Sarah, 8 Wheat. 394.

⁴ The Aurora v. The United States, 7 Cr. 382.

⁵ The Hoppet v. United States, 7 Cr. 389; The Caroline v. United States, 7 Cr. 496.

⁶ The Mary Ann, 8 Wheat. 380; The Anne, 7 Cr. 570; The Divina Pastora, 4 Wheat. 52; The Edward, 1 Wheat. 261; The Adeline, 9 Cr. 284; The Caroline, 7 Cr. 496.

⁷ The Schooner Anne, 7 Cr. 570;

Much misunderstanding has existed with regard to the use of alternate allegations in informations in proceedings *in rem*. On the one hand, the certainty of criminal indictments has been contended for; on the other, a looseness such as would be inadmissible in civil actions of a personal character has been thought allowable. A little reasoning on the subject ought to satisfy any candid inquirer.

In all pleading there should be certainty—whether the case be civil or criminal. We have no more right to take a man's property under ambiguous declarations than we have to take his life. As in a criminal prosecution, we should not allege guilt in the alternative, so in a civil proceeding against a guilty thing, we should not allege the offense in the alternative; nor, should we allege the hostility in the alternative, in proceedings against enemy property; nor indebtedness in the alternative, in enforcing an admiralty lien.

§ 61. **Alternate Allegations.** But it is quite a different matter, when we are stating facts, any one of which shows the *jus in re* upon which the forfeiture is declared. Facts may be stated in the alternative, if, any one of them being true, the offense is established; any one being true, the hostility of the *res* is the inevitable result. It has been repeatedly decided that “stating a charge in the alternative is good, if each alternative constitutes an offense for which the thing is forfeited.”¹

In the case of the *Emily and Caroline*, the libel had charged that the vessel had been “fitted out within a port” or “caused to be sailed from a port” of the United States; and it was held that as either act would constitute the offense under the statute, the libel was good, and the vessel was forfeited. Judge STORY, in an *errata* note, explains with regard to the second case above cited, that, the stating of the facts in the alternative would not

The *Edward*, 1 Wheat. 261; The *Marianna Flora*, 11 Wheat. 1; The *Freundschaft*, 3 Wheat. 14; *Cargo of the Schooner North Carolina*, 15 Pet. 40.

¹ The *Emily and the Caroline*, 9 Wheat. 381; The *Caroline*, 7 Cr. 496.

(Note by Judge STORY, p. 500;) *United States v. The Little Charles*, 1 Brock. 348; The *Merino*, 9 Wheat. 391; The *Samuel*, 1 Wheat. 14; *Jacob v. United States*, 1 Brock. 520; *Parsons on Shipping and Admiralty*, Vol. 2, p. 383, Edition of 1869.

have been erroneous, if each alternative had constituted an offense for which the vessel would have been forfeited. And the court remarked that if alternate allegations, when each constitute the offense, are objectionable, the objection might be made to an information laying each offense in a separate count. But this is not perfectly to the point, for there is a manifest difference between charging the facts in the alternative to show one offense, and charging two offenses in the alternative. Two different counts, either charging a distinct offense, should not be in the alternative; and such charging would not be analogous to the stating of two facts, coupled with a disjunctive, either of which being true, the offense is charged. But this reasoning of Judge STORY has been adopted by the Supreme Court, in a case comparatively recent. The principle is doubtless correctly stated by Mr. Justice STORY in the note to the *Caroline*, above mentioned, and by C. J. MARSHALL in *Jacob v. United States*. Mr. Parsons so fully approves the doctrine, as to prefer alternate allegations under some circumstances. He says that the libellant may sometimes be uncertain which of two or more facts are true, yet he may know that the offense has been committed and that some one of two acts has been done either of which would be a committal of the offense.

This was especially the case during the late war, when it was difficult to get the necessary intelligence from beyond the enemy's lines to show precisely in what capacity the owner of hostile property had placed himself within one of the classes of enemies so as to render his property forfeit, under the Act of July 17, 1862.¹ Libels of information, under this act, were drawn with the facts relative to the owners of property stated in the alternative but with the enemy-character of the *res* charged positively and without alternation. Some of these libels, with reference to these alternate statements of facts, were brought under review in "The Confiscation Cases;"² and the authorities which we have referred to above, were nearly all

¹ United States Stat. at Large, XII., p. 589. ² 20 Wall. 106.

examined by the court, and the doctrine was fully reaffirmed. The court said:

“No judgment was possible against any person. The enactment of Congress was that property belonging to any one embraced within several classes of persons should be subject to seizure and condemnation. Persons were referred to only to identify the property. Not all enemies' property was made confiscable—only such as was designated by the act; and reference to the ownership was the mode selected for designating that which was made liable to confiscation. If the property belonged to a person who had filled either of the offices specified, or who had done any of the acts mentioned in the fifth, sixth or seventh articles of the information, it was the property which the act had in view. * * * In either alternative, the property was made subject to confiscation.”

§ 62. **Articulate Propounding.** Articulate propounding, required by the admiralty rule¹ of the Supreme Court, and of reverend usage, should be practiced in all informations *in rem*, whether they be admiralty libels or not. We must do so when required by those rules; we may do so for convenience sake when not required.

Some informations are very simple. The prize libel is one of the simplest. It is thought that the more general the allegations the better. Special averments of the circumstances of the capture are not required, nor the grounds upon which the condemnation is sought, further than the averments of the capture from the enemy, the bringing in of the prize, and the enemy character, showing that the ship is subject to prize rights.²

But something more is necessary when hostile property seized on land is to be condemned. The averment that the political power has authorized such seizure is essential. And where the proclamation of the president is required by Congress as a preliminary to seizure and further proceeding, the fact of the proclamation having been made must appear in the information.

¹ 22d Ad. Rule.

² The *Fortuna*, 1 Dod. 81; The *Adeline*, 9 Cr. 244.

These necessary averments may be stated in separate articles, and they should be so set forth as to give a clear, distinct and logical understanding of the right to proceed.

If the political power has determined to limit the condemnation of enemy property seized on land to certain classes, the information should so describe the *res* as to bring it within one or more of those classes. But the charging part of the information is very simple when these preliminaries have been disposed of: like a prize libel, the information need only charge that it is enemy property forfeited to the government.

§ 65. **Following the Statute.** In revenue seizures, and many others under special statutes, the charging part of the information should be more pointed. The general rule—one that no pleader should depart from—is that the information must follow the statute. The importance of the articulate propounding of the charges now becomes manifest. The *guilt* of the *res* is here the ground of condemnation; and where guilt is predicated upon the violation of more than one requirement of statute, or of two or more statutes, it is as important that the charges be stated in different articles, as that there should be different counts in an indictment where there are more than one ground of accusation. These different violations of law, in, with or by the thing accused should be positively stated, without any ambiguity, without alternation.

It is true that the niceties of the criminal practice are not required in any pleadings *in rem*,¹ but the subject matter should be stated with clearness and precision, and with averments that admit of distinct answers,² and in distinct articles,³ and with reasonable certainty of time and place;⁴ for, unless the particular facts intended to be relied on are stated, they will not be considered at issue,⁵ and the information, in case of statute forfeitures, is bad if it does not agree sub-

¹ *Jenks v. Lewis*, 1 Ware, 51; *Dupont de Nemours v. Vance*, 19 How, 162; *The Steamer Uncle Sam*, 1 McAll. 505; *The Iris*, 1 Low. 520; *The Quickstep*, 9 Wall. 665; *The Merino*, 9 Wheat, 391.

² *The Boston*, 1 Sumner, 328.

³ *Orne v. Townsend*, 4 Mason, 541.

⁴ *Treadwell v. Joseph*, 1 Sumner, 390.

⁵ *The Isabella*, 1 Paine, 2.

stantially with the terms of the statute.¹ Not only the facts should be stated, but it should also be averred that thereby the thing seized became forfeited.² Extraneous matter should not be allowed in the information.³ Nor should incongruous grounds of condemnation, such as the infringement of a statute and a general prize allegation, be conjoined in one information.⁴ Under the Neutrality Act of 1794, the information need not state the person by name against whom the ship was fitted out to cruise.⁵

§ 63. **Concluding Against the Statute.** Concluding "against the form of the statute in such case made and provided," or equivalent words, is usual, but it is only necessary where the forfeiture is a statute forfeiture. Defective averments in the information would not be cured by concluding against the form of the statute.⁶ Much misunderstanding has arisen as to the importance and the effect of concluding "against the statute," etc. The 22d Admiralty Rule of Practice for the courts of the United States, requires that "All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure," etc. "The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and *aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require.*" The misunderstanding has arisen because the true rule has not always been invoked when the inquiry has been whether or not a given case has *required* such conclusion.

The true rule is, that where statutes have been infringed this form of averment must be used. An offense which is *malum prohibitum*, made such by an act of legislation, when charged against a thing seized, should be declared to have been committed contrary to that act. But what reason would there

¹ The Betsey, 1 Mason, 354; The Brig Neuria, 19 How. 92; The Steamboat Cora, 1 Dak. T. 1; The Schooner Paryntha Davis, 1 Cliff. 532.

² Gelston v. Hoyt, 3 Wheat. 246.

³ Steamboat Orleans v. Phœbus, 11 Pet. 175.

⁴ The Dimon, 2 Gallis. 306.

⁵ Gelston v. Hoyt, 3 Wheat. 246.

⁶ The Nancy, 1 Gal. 67.

be for such an averment if the forfeiture was not for an offense created by statute? What propriety would there be in such an averment, in a prize libel, where the condemnation is not for any violation of statute? It has been seriously contended that libels of information against enemy property should aver that it is enemy property "contrary to statute."

The 22d Rule, after naming revenue and navigation laws, adds, "or other laws of the United States;" but we are directed to use the given form, "as the case may require." Now, certainly, acts of Congress which merely declare the purpose of the government to proceed against enemy property, do not "require" the making of the allegation that such property became hostile by reason of any violation of such acts, since such allegation would not be true.¹

¹ See *The Mary Ann*, 8 Wh. 380; *The Merino*, *The Constitution*, *The Louisa*, 9 Wh. 391.

CHAPTER VII.

NOTICE.

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§ 64. **Notice Necessary.** Notice in actions *in rem* is doubly given: by *seizure* and by *publication*. In prize cases, seizure is all that is required, since the prize is taken from an enemy. Notice is the life of the action, as citation or subpoena is in a personal case. It is absolutely necessary in order that the judgment of either condemnation or acquittal which is to follow, may be binding as *res judicata* against all the world. It would be an unjustifiable hardship, an act of real robbery, to deprive a man of his property without notice of the judicial proceedings against it. It would be the taking of property without due process of law, and would be grossly violative of the Constitution of the United States.

It is true that no personal service is made when the action is against property; nor can any sufficient one be made, since it is impossible to deliver a personal citation upon every man. No personal citation is served upon the owner of the thing seized, even when he is known, and his late ownership stated in the information; for the theory of the whole proceeding is that he is no longer the owner; that the thing is already forfeited; that he has no more right to it than any other person; that he may appear and claim, just as any other may. The *thing* is the defendant, and he may appear for it; or, failing to appear, he is to occupy the position of the rest of the world, and will be forever concluded by the judgment, and forever held in contumacy and default.

It is true that the presumption that he is really informed by seizure and advertisement, may, in many cases, be violent; it is true that, by reason of his absence in a foreign country or some other reason, he may remain in complete ignorance of the proceeding, from seizure to final sentence, and may innocently lose his property: but the presumption is necessary to the very existence of proceedings *in rem*. The cases of hardship are comparatively few, while the benefits of this mode of procedure are so great that it would be almost impossible to enforce our revenue and navigation laws, liens in admiralty, and many statute rights, without the use of it. In cases of great wrong done by this method, in government causes, there is always left the presumption that nations are just and will right the wrongs done by them, however violent this presumption may prove to those who rest upon it for relief.

§ 65. **Seizure a Kind of Notice.** Of the two means of notice, above mentioned, seizure is limited to those owning the thing proceeded against, and to those who, for any reason, are legally presumed to know of the seizure; while advertisement is supposed to reach all; but where only the interested owners need to know, since only they could complain of want of notice, seizure is notice sufficiently extensive as to them, but a decree rendered without general notice, would not be conclusive upon all the world. The reason why seizure of real estate is deemed notice to the owner is based upon the presumption of law that every man knows whether his lands are in the adverse possession of another.¹ "Other presumptions of this class," said the court in *Cross v. The United States*,² "are founded upon the experience of human conduct in the course of trade, men being usually vigilant in guarding their property, and prompt in asserting their rights, and orderly in conducting their affairs, and diligent in claiming and collecting their dues." The presumption has always prevailed and is sufficiently stated in the

¹ Lane v. Shears, 1 Wend. 433; 2 Phillips' Ev. 296; 1 Saunders' on Pleading, 408; Boswell's Lessee v. Otis, 9 How. 336; Scott v. Sherman, 2 Wm. Bl. 977; Hollingsworth v. Barbour, 4 Pet. 475; Keating v.

Spink, 3 Ohio State, 114; Thompson v. St. Bt. Morton, 2 Id. 30; Stewart v. Board, etc., 25 Miss. 479; New Orleans, etc., v. Hemphill, 35 Id. 24.

² Cross v. United States, 1 Gallison, 28.

elementary books.¹ And the presumption is applied to personal property as well as real.

An examination of the cases we have cited, will show that they give to seizure a wider scope as notice, than has been given it, in the remarks above. The true rule and the true reason of it, are well expressed in *Scott v. Shearman*,² if we confine ourselves to this extract: "Seizure itself is notice to the owner, who is *presumed to know whatever becomes of his own goods*." The presumption of knowledge seems sometimes to extend beyond the owners, as, in *Cross v. The United States*, it was said that this and like presumptions "are founded upon the experience of human conduct in the course of trade—men being usually diligent in guarding their property * * * and *diligent in claiming and collecting their dues*." The latter clause seems to be offered as a reason why seizure is notice to the holder of a mere *jus ad rem*. It should be received with extreme caution.

The cases of *Hollingsworth v. Barbour*, *Keating v. Spink*, *Thompson v. Steamboat Morton* and *New Orleans v. Hemphill*,³ (though not without such support as may be found in many similar decisions,) go too far when they lay down, as a general doctrine, that seizure alone is sufficient notice to "all the world." The reader will consider them as cited here only to support the doctrine as above stated; not to go beyond it. He will find elsewhere, in this treatise, that in order to have jurisdiction over the subject matter so as to bind all persons, the court must have not only the custody of the *res*, but the power to declare the divestiture of its former owner's title, and of all liens: so notice is essential.

§ 66. **Publication.** The reason why publication is deemed notice to everybody is that everybody is presumed to read the newspapers or to see the posted placard; and because this is the best method of conveying knowledge of the suit to all persons, of which the nature of the proceedings is susceptible.

1 Greenleaf on Ev. 43, Sec. 38; p. 289; note to p. 298.

Story's Conflict of Laws, § 549; 1 ² Above cited.

Phillips on Ev., pp. 156, 198; 2 Id., ³ Id.

As notice by seizure and advertisement stands in lieu of citation, it should come as nearly as possible to personal summons. The arrest should be made as publicly as is consistent with the performance of a duty sometimes delicate, and the advertisement should be in some official journal, or some widely read gazette;¹ or, in the absence of a newspaper, the posting of the advertisement should be in one or more very conspicuous places. The publication should contain such description of the thing seized as to convey knowledge of it to any one interested. If the *res* be real estate, there should be a sufficient description of its situation, quantity and bounds; for the personal notice to the tenant in possession does not stand in the place of the requisite advertisement, in case of the seizure of land: such personal notice is only a method of seizure. It aids seizure as notice, but it is not a substitute for notice by publication. It is, in no sense, analogous to citation in a personal action, for it does not bring any defendant into court in such a sense as to make him liable to costs, or to any personal judgment against him, in case he should not choose voluntarily to appear as claimant or intervenor.

§ 67. **Marshal's Return.** The return of the marshal or sheriff, showing seizure and publication, cannot be too carefully made, since it is the evidence to the court of the notice given to the world; since the court cannot have it altered, amended or eked out:² for, though the clerk is the right hand of the judge, and is immediately under his direction, the executive officer is not so to the same extent; the marshal is an officer of the district rather than of the court; he is not a ministerial officer.

The altering, changing or contradicting of the marshal's return, either by act of himself or by the testimony of others, cannot be done at any stage of the case, even under the order

¹ Beecher *v.* Stephens, 25 Minn. 146; Green *v.* Squires, 20 Hun. Pr. 492; *Id.*, 28 N. Y. Sup. Ct. R. 15; Cincinnati *v.* Bickett, 26 Ohio St. 49; Kellogg *v.* Carrico, 47 Mo. 157; Kerr *v.* Hitt, 75 Ill. 51; Sheldon

v. Wright, 5 N. Y. 497; Soule *v.* Chase, 1 Rob. (N. Y.) 222; Brewer *v.* Springfield, 97 Mass. 152.

² The Roslyn, 8 Ben. 455; Elee *v.* Wait, 28 Ill. 70.

of the court, so as to make *that* notice which was no notice; or to make that no notice which was notice; but amendments to the return by way of supplement, by leave of court, may be made in proper time, during the progress of the cause, where the interests of no party are injured, and where there is no objection. The officer may amend his return before filing it.¹

In *Witherell v. Goss*² the court said: "The return of the officer is conclusive evidence between the parties * * * that this complainant was notified of the time and place where the writ was returnable. If that return was incorrect or false, the remedy of the party is by action against the sheriff for a false return. It was observed by PRENTISS, J., that 'in no case where the party had time and opportunity to take advantage of the matter and neglected to do it, can he be relieved by this writ, [*audita querula*];' and that he is deemed to have had his opportunity in all cases where it *appears from the return of the officer that he had legal notice of the suit*; and if, in truth, he was not warned, he has his remedy against the sheriff for a false return.' This is the rule in England. 2 Saund. 148 (b). The falsity of the return cannot be questioned by the parties: only in a suit by the party injured against the officer."

Nor can an officer's return of due and legal service be set aside by a writ of error *coram nobis*.³ Nor can a judgment be impeached collaterally for errors or irregularities, such as a defective return of seizure and publication.⁴

The general doctrine concerning the marshal's return, as above set forth, is extended in the main to sheriff's returns upon notice by publication by the State courts.⁵

Nelson v. Cook, 19 Ill. 440.

² 26 Vt. 750.

³ Shoffet v. Menifee, 4 Dana, (Ky. R.) 150.

⁴ Cammell v. Sewell, 3 Hurl. & Nor. 617; Castrique v. Imrie, 8 Com. Bench, (N. S.) 1; Knœfel v. Williams, 30 Ind. 7; Shroyer v. Richmond, 16 Ohio State, 455, 456; Spaulding v. Baldwin, 31 Ind. 377.

⁵ Mueller v. Bates, 2 Disney, 318; Rowell v. Klein, 44 Ind. 290; John-

son v. Jones, 2 Neb. 126; Crowell v. Galloway, 3 Neb. 215; Botsford v. O'Connor, 57 Ill. 72; Glencoe v. People, 78 Ill. 382; Freeman v. Thompson, 53 Mo. 183; Bolard v. Mason, 66 Pa. 138; Rowley v. Howard, 23 Cal. 401; Chittenden v. Hobbs, 9 Iowa, 417; Coffee v. Gates, 28 Ark. 43; State Bank v. Marsh, 10 Ark. 129; Estate of Robinson, 6 Mich. 137; Mendioca v. Orr, 16 Cal. 368; Fisher v. Fredericks, 33 Mo. 612; Bendy v. Boyce,

It will be found convenient, in considering the subject of notice, to take seizure as notice, and publication, along together, since the authorities generally do so.

§ 68. **Decisions on Seizure as Notice.** There are many decisions which treat publication (whether monition in admiralty or advertisement under other name,) as of less importance than would seem to belong to it; but it is better to present the law as we find it, and to bow to authority where it does not destroy the symmetry of any system; where it does not conflict with established legal science and with demonstration of truth.

It is held that seizure alone is notice to all persons interested.¹ C. J. MARSHALL, in *The Mary*,² said: "Where the proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have an interest in it to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the *Mary* has constructive notice of her seizure, and may fairly be considered a party to the libel." Judge STORY has repeatedly stated the doctrine as broadly,³ saying, in the first of Gallison: "The seizure itself is full notice, for the possession itself is notorious and open." And the very words of Chief Justice MARSHALL were quoted by the Supreme Court as the law on the subject in the 24th of Howard.⁴

"The law regards the seizure of things as constructive notice to all the world; and all persons concerned in interest are con-

37 Tex. 443; *Hodges v. Brett*, 4 Greene, (Iowa,) 345; *Miltown v. Fouts*, Id. 346.

¹ *The Mary*, 9 Cr. 126, 144; *Hollingsworth v. Barbour*, 4 Pet. 475; *Keating v. Spink*, 3 Ohio State, 114, 115; *Thompson v. Steamboat Morton*, 2 Ohio State, 30; *Story's Conflict*

of Laws, § 549; *Boswell's Lessee v. Otis*, 9 How. 336.

² 9 Cr. 126, 144.

³ *Bradstreet v. The Neptune Ins. Co.*, 3 Sumner, 609; *Schr. Bolina and Cargo*, 1 Gal. 79.

⁴ *Nations v. Johnson*, 24 How. 205, 206; *Vide, Harris v. Hardeman*, 14 How. 339.

sidered as affected by this constructive notice.”¹ And the seizure, even if constructive merely, gives jurisdiction.²

Such is the law of constructive notice by seizure, as broadly stated in the decisions cited; but the better opinion seems to be that there should be published notice to reach all persons; and that seizure is notice only so far as the law presumes interested persons to know the condition in which property is upon which their interests rest.³

§ 69. **Errors as to Want of Notice.** Some have even gone so far as to suppose that actions *in rem* form an exception to the general rule requiring notice, and that one's property may be taken by such an action without any notice at all. The Supreme Court of Maine⁴ said: “Laws authorizing proceedings *in rem* may be enforced against the property seized when the real owner may not be informed thereof.” He must, in contemplation of law, be “informed thereof,” though he may not really know of the proceeding; just as in a personal action, the citation may, in certain cases, be left at the domicile of the defendant with some one of lawful capacity residing there, and the defendant himself might not really get knowledge of the suit. The learned court, in *Gray v. Kimball*, could not have meant that property could be forfeited without even constructive notice. And C. J. Smith, of Mississippi, stated the principle too broadly⁵ when he said: “As a general principle, notice, either actual or constructive, to the party affected by the judgment of the court, is essential to its validity; but there is an exception to this rule, recognized at the common law and by the jurisprudence of this State. This exception applies to the class of cases styled proceedings *in rem*, or suits in the nature of proceedings *in rem*. In these proceedings or suits, the judgments of the courts are conclusive against all persons interested in the subject matter of the suit, whether they had notice of the proceedings or not. And their validity and con-

¹ Hollingsworth v. Barbour, 4 Pet. 475.

² Miller v. United States, 11 Wall. 268; Tyler v. Defrees, Ib. 331; The Nausau, 4 Wall. 634, 641.

Post, Book IV., Part II.

⁴ Gray v. Kimball, 42 Me. R. 299, 307.

⁵ New Orleans, etc., v. Hemphill, 35 Miss. R. 24.

clusiveness rest upon a principle of public policy." A principle resting upon public policy without any underlying foundation in justice rests upon thin air; and the learned judge would have taught serious error had he not, further on, made it clear that he had not meant to discard seizure and the presumption of knowledge of it on the part of the owner, as well as publication, when he said that judgments of courts were conclusive in cases *in rem* when there was no notice at all.

§ 70. **Admiralty Monition.** Public notice is required, by the 9th Admiralty Rule, to be given in all cases of seizure, and in other suits and proceedings *in rem*, setting forth the seizure, the time assigned for the return of the process and the hearing of the cause, in such newspaper within the District as the court may order, or, in the absence of a paper, then in such public places, within the District, as the court may direct.

The publication is called a *monition* when the case is one of the admiralty; but it does not differ, when considered as notice, from an advertisement by the marshal when seizure is made on land.

The form of the publication, after the title and number of the suit and the style of the court, and the designation of the district, should be substantially as follows: "In obedience to a warrant issued in this court, to me directed, in the above entitled suit, I have seized and taken into my possession [here described the thing seized] now libelled [or informed against] by the United States, for the reasons assigned and set forth in the information [or libel] in the above entitled suit, now pending in the said District Court. And I do hereby cite and admonish the owner or owners thereof, and all persons having or pretending to have any right, title or interest in or to the same, to be and appear at a District Court of the United States for the district aforesaid, on or before the third Monday from the date hereof, to show cause, if any they have or can, why the said above described property should not be condemned as forfeited to the United States, agreeably to the prayer of the libellants [or complainants]." Dated, United States Marshal's Office, Detroit, January 8, 18— and signed by the marshal in his official capacity.

§ 71. **Slight Variances.** The advertisement is sufficient, if it give such notice as would put any one interested in possession of such knowledge as would enable him to defend his property.¹ Even in cases of real estate seizures, superfluous and inconsistent descriptions of property may be considered as unwritten, and the necessary words retained.² A slight variance between the description of property in the advertisement and that in the notice given at the time of seizure, is immaterial, if it is such as could not have misled the person interested.³ Even in a *capias*, where the word "Middlesex" was misspelled "Middsex," the error was held unimportant.⁴ Where a name appears in a monition or other advertisement as notice in case of seizure, as, for instance, after the description of the *res*, if it should be added, "lately belonging to A. B., or to some person or persons unknown," the publishing of a wrong name would not affect the validity of the notice. It has been held that even in a personal action, where the process contained a wrong name which sounded like the true one in enunciation so as to be not distinguishable, there was no variance; that the doctrine of *idem sonans* was applicable.⁵ The written variance was between "St. Clair" and "Sinclair." And in another case, there was the difference between "Dougal" and "Dougald," which the court held immaterial.⁶ And, even in personal actions, it is too late to object to a notice which was really bad, after appearance and defense made.⁷ And, in admiralty, the want of a monition to appear is cured by an actual appearance.⁸ And when property was condemned before the return day of the monition, it was held to be not such an error as could be successfully attacked in a collateral action.⁹ No errors of notice

¹ Goodman v. Niblack, (12 Otto.) 102 United States, 556.

² Worthington v. Hylyer, 4 Mass. 205; Jackson v. Sprague, 1 Paine, 494; Vose v. Handy, 2 Greenleaf, 322; 1 Greenl. Ev., last note to sec. 301.

³ Dabbs v. Hemken et al., 3 Rob. (La.) 129.

⁴ Colston v. Berends, 1 Cro., Mees. & Ros. 833.

⁵ Rivard et al. v. Gardner, 39 Ill. 125.

⁶ Barnes v. The People, 18 Ill. 52.

⁷ Marshall v. Byram, 1 Bibb, 341; Miller v. Commonwealth, Id. 404; Winston v. Overseers of the Poor, 4 Call, 357; Vickroy v. Skelley, 14 S. & R. 372; Rowley v. Stoddard, 7 Johns. 207.

⁸ Penhallow v. Doane, 3 Dall. 54.

⁹ Tyler v. Defrees, 11 Wall. 331.

can, after judgment, be inquired into in a collateral action,¹ but want of notice can be.

Many State reports throw light upon the subject of notice, and they may be consulted for the reasoning they present, though the cases be personal actions. A requirement of sixty days' publication of notice was held satisfied by one publication made sixty days before the time fixed.² "Notice in a newspaper" is equivalent to "public notice," in an officer's return.³ Publication in three weekly issues in succession, is a compliance with a statute requiring notice "three weeks successively," though three weeks of time may not have elapsed, since the last issue may be but a day old.⁴ A slight variation in the name of the newspaper and the designation in the order for the publication therein, is not fatal.⁵ The notice must be in English, when no language is specified in the order.⁶

§ 72. **Limited Notice.** Limited notice is that which is given only to a certain designated person or persons. It has frequently been said by the courts that probate proceedings against a decedent's estate are sometimes *in rem*; but when so, the proceedings are binding only upon the heirs and such other persons as are notified. The same is true of attachment proceedings, mortgage foreclosures, and the like, when they are *in rem*, with notice restricted to the debtor, mortgagor, etc.⁷

The limited character of the notice precludes the decree from being binding upon all the world, since all cannot be said to be parties constructively notified.

¹ *Cole v. Hall*, 2 Hill, (N. Y.) 627; *Carleton v. Washington Ins. Co.*, 35 New Hampshire, 162-166; *Morrow v. Weed*, 4 Clarke, (Iowa,) 89; *Paine v. Mooreland*, 15 Ohio, 435; *Wright v. Marsh*, 2 G. Greene, 109.

² *Andrews v. Ohio R. R. Co.*, 14 Ind. 169; *Muskingham Valley Turnpike v. Ward*, 13 Ohio, 120.

³ *Baily v. Myrick*, 50 Me. 171.

⁴ *Swett v. Sprague*, 55 Me. 190; *Swayze v. Doe*, 21 Miss. 317.

⁵ *Soule v. Chase*, 1 Abb. (N. Y.) Pr. N. S. 48.

⁶ *Road in Upper Hanover*, 44 Pa. State Rep. 277. And generally on the subject of slight variances, see *Early v. Doe*, 16 How. 611; *Ronken-dorff v. Taylor's Lessee*, 4 Pet. 361; *Sheldon v. Wright*, 7 Barb. 45 and id. 5 N. Y. 517; *Olcott v. Robinson*, 20 Barb. 149, and id. 21 N. Y. 153; *Chamberlain v. Dempsey*, 13 Abb. 422; *Bachelor v. Bachelor*, 1 Mass. 256; *Bunce v. Reed*, 16 Barb. 351; *People v. Gray*, 10 Abb. 469.

⁷ *Haywood v. Russell*, 44 Mo. 252; *Savings Society v. Thompson*, 32 Cal.

For the same reason proceedings against property, in classes of actions ordinarily conclusive against all the world, may be shorn of their effect by limitation of notice, as hereafter shown. This extensive subject must be relegated to the fourth book, in the second part of which it is treated as "Proceedings *in rem* with Limited Notice."¹

A failure to observe the difference between proceedings with general notice and those with restricted notice, has proved prolific of many erroneous conclusions.²

Where there are statutes requiring notice by publication in the different States, when the proceedings are against the estate of a decedent, or in attachment, or to foreclose a mortgage lien; whether the notice be in a case *in rem*, or only *quasi* so, the statute must be strictly complied with; the full time must be observed, etc.³

Where the notice is "to all persons interested,"⁴ it would seem to be such general notice as to lead to the decree *res judicata quo ad omnes*, if the statute is otherwise in conformity. In such case, it is particularly important that the "interested" have their full time of notice, be it three weeks or as many months;⁵ and the court should be liberal towards those constructively notified when questions arise as to the time.

In Florida, personal notice was held necessary in a suit treated by the court as *in rem*;⁶ and, since such notice could not possibly be served upon "all the world," it seems clear that the proceeding was of a very limited scope and confined to

347; Sweet v. Sprague, 55 Me. 190; Bennett v. Hetherington, 41 Iowa, 142; Gibson v. Roll, 30 Ill. 172; Herdman v. Short, 18 Ill. 59.

¹ Book IV., Part II.

² Chap. LIII.

³ Pomeroy v. Betts, 31 Mo. 419; Scorpion S. M. Co. v. Marsano, 10 Nev. 370; Likens v. McCormick, 39 Wis. 313; People v. Huber, 20 Cal. 81; Bobb v. Woodward, 42 Mo. 482; Sexton v. Rhames, 13 Wis. 99; Lawrence v. State, 30 Ark. 719; Cook v.

Farren, 34 Barb. 95; Lovejoy v. Lunt, 48 Me. 377; Zacharie v. Bowers, 3 Sm. & M. 641.

⁴ Corwin v. Merritt, 3 Barb. 341; Havens v. Sherman, 42 Barb. 636.

⁵ Hill v. Foison, 27 Tex. 428; Morris v. Hogle, 37 Ill. 150; Grewell v. Henderson, 5 Cal. 465; Mitchell v. Woodson, 37 Miss. 567; Schnell v. Chicago, 38 Ill. 382; Crabb v. Atwood, 10 Ind. 331; King v. Harrington, 14 Mich. 532.

⁶ Simpson v. Knight, 12 Fla. 144.

such persons as were cited within the court's jurisdiction, though it has been thought in another State that courts could go beyond such line in making personal notice.¹

It should ever be borne in mind that there are no personal defendants to proceedings *in rem*; and that notice by publication, or by personal invitation, is merely to afford the opportunity for interested persons to set up their claims. Notice by publication, or invitation to appear, does not give jurisdiction over the persons addressed.²

¹ Fisher v. Fredericks, 33 Mo. 612; 77; Billings v. Kothe, 49 Iowa, 34; McBride v. Harn, 52 Iowa, 80 (supposed notice made in Ohio.) Belcher v. Chambers, 53 Cal. 635 (overruling Hahn v. Kelly, 34 Cal. 391).

² Mercantile Trust Co. v. R. R., 16 Blatchf. 324; Walker v. Day, 8 Bax.

CHAPTER VIII.

THE CLAIM, INTERVENTION, STIPULATION AND ANSWER.

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§ 73. **Claimant's Appearance Voluntary.** In response to the notice any one may appear and claim the thing seized. Any one having, or pretending to have any right in or to the thing, being invited by the monition or other advertisement by the marshal or other officer who has seized and is holding the thing, now has his final opportunity given him to have his rights adjudged. He cannot be debarred this right if the judgment and sentence is to be conclusive against him, as they must be in all proceedings *in rem* conducted according to ancient usage, according to law as settled in England and all the civilized nations, and as settled in this country by statutes, court rules, and a long line of precedents.

There is no exception to the rule that any one may respond to the call, except that an enemy could not be allowed standing in the courts of the country, though it is reserved for another part of this treatise whether he could come into a court of nations sitting in the country of the opposite belligerent. Certainly neutrals, whose property is proceeded against for some hostile act done in, with or by it, have a right to respond to the monition, and to claim and defend in a prize case. The hostile act, when proved, would result in the condemnation of the prize, but the charge of the hostile act by the libellant would not prevent the neutral owner from coming into court.

The claimant comes voluntarily, in response to the notice.¹ He has not been sued, and he may keep out of court and avoid costs if he choose to do so. He is rather a plaintiff than a defendant: as an asserter of ownership or of some other interest, he is an actor, and the burden of proof is upon him; but as a resister of the charges, he defends for the thing which is the real defendant. As it does not matter to the *promovent*, (as the complainant is called in the Roman law,) who *owned* the property prior to the forfeiture; as it is equally a matter of indifference to him who owns it at the time of pleading, trial or at any time, in case it should be decreed not to have been forfeited, he will not attempt to prove the ownership: but it is of the first importance to the claimant that he shall prove it. Indeed, he must make a *prima facie* showing of his interest before he can get beyond the portals of the forum to which he is invited. Any person may come, but he must aver an interest and swear to it, before he can be heard further.² He may appear simply as claimant; as claimant and defendant of the *res*; as intervenor, coming between the complainant and the *res*, to assert some interest in the thing which he wishes to protect and conserve, whether the thing be condemned or not; or he may appear as intervenor and defendant of the thing.

One who should claim, yet not defend, would have for his object the delivery of the thing to him, in case he should make out his claim, and the complainant fail to make out a case of forfeiture. One who should claim and defend, would aim to prevent the condemnation and have the thing restored to him, if it had been taken from his possession, or delivered to him as the rightful owner, in case it had been seized from the hand of some unlawful possessor. One who should intervene to assert some *jus ad rem* which he believes and asserts to be prior in rank to that of the complainant, might or might not aim to prevent condemnation, if his interests could be protected in either event by judgment of court; he may be the ally either of the com-

¹ The Merino, The Constitution,
The Louisa, 9 Wh. 391.

² Steamboat Burns, 9 Wal. 239;
422 Casks of Wine, 1 Pet. 547; 26th
Ad. Rule.

plainant or the claimant on the trial of the cause, as circumstances and good conscience might warrant. One who appears as intervenor, and who yet is interested in defending the seized thing that it may be restored to the owner, with his rights still resting upon it, may unite the two characters of intervenor and defendant of the *res*.

§ 74. **Claimant's Affidavit of Interest.** *Prima facie* showing of interest is necessary, at the first stage of his litigation, whether he appears as intervenor, or claimant or defendant of the *res*, or in any capacity in response to the notice. But nothing more than a *prima facie* showing—a swearing to the claim or intervention or answer, can be required at the beginning, since the judge, who is cold and blind and indifferent to the quarrel, as he is always presumed to be at this stage, cannot say to the face of the invited appearer who has sworn to his interest, “you have no interest, and you ought not to be allowed to intervene or claim.”

The claimant or intervenor may appear in person, but it is usual for him to have a proctor in admiralty or an attorney-at-law; he may appear by agent; the consignee of a cargo or the master of a ship, or any person authorized by power of attorney, or by his peculiar relations to the owner, may appear as claimant in behalf of the owner. In all cases where an agent claims in such behalf, he must swear to his authority as well as to the claim. The 26th Admiralty Rule provides that, “In all suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant, by whom or on whose behalf the claim is made, is the true and *bona fide* owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or, if the property be, at the time of the arrest, in the possession of the master of the ship, that he is the lawful bailee thereof for the owner.” In all proceedings *in rem*, on the law side of the court as well as the other, claimants should make similar showing; and agents who represent principals and swear for them, should also swear to their authority, and then prove it at the proper time.

§ 75. **Stipulation for Costs.** There is another requirement, besides the affidavit, and that is the stipulation. It is required, in admiralty cases, by the 26th Rule; and, whether required by statute in all cases or not, the claimant must by express stipulation or, where that is not required, simply by his appearing in the suit as a party, be bound to pay such costs as the court may decree against him. In cases under State statutes, security may not always be required, as it is in admiralty, but the responsibility for costs would be the same as in any other case; the clerk of court might require it; the opposite party might rule the new appearer into court to show cause why he should not give it.

No sum is fixed by law as the amount of the stipulation. Courts may fix the amount. Some of the District Courts have fixed \$250 as the sum, in all cases in admiralty—revenue cases and others—but the better way is to fix it in accordance with the amount involved.

The intervenor is also required to make stipulation by the 34th Rule; but why he should be obliged to give security for damages as well as costs and expenses, while the 26th Rule does not require it of the claimant, is somewhat singular, since both claimant and intervenor must be bound, as parties to the suit, to all such damages as well as costs which the court may decree against them, whether they have secured the collection of it by previously giving security or not. And this is true in all cases *in rem*.

“The rules relative to suits *in rem*,” says Judge CONKLING,¹ “were not intended to change or modify the correct antecedent practice, but to declare and establish it. They require of the owner of the property proceeded against, as the condition on which he is to appear in court as claimant, and in that character to contest the demand of the libellant, that he shall give security for any costs that may be adjudged against him in the suit; and to exact the like condition of any third person who comes into court for the purpose of enforcing any claim which he pre-

¹ Conkling's United States Admiralty, Vol. 2, p. 97, 2d edition.

tends to have against the same property, and who, in such case is said to intervene for his interest."

Compliance with "the condition on which he is to appear, establishes the claimant's or intervenor's right to the character of litigant,"¹ and he appears as an actor.² Claims are frequently made through agents.³

Although the claim or intervention should be made, and the affidavit signed, and the stipulation entered into by the principal rather than an agent, and always by the principal when he is present or when it is conveniently practicable for him to be present,⁴ yet, a consul, though he has no authority from the principal, may appear in court, by virtue of his official character, to defend property of the citizens of his country; but, in case of an order of restoration, he would not be given possession of the *res* as claimant, without his exhibition of power of attorney from the owner to receive it.⁵

§ 76. **The Admiralty Rule.** The clause of the 26th Admiralty Rule which requires the claimant of a thing not only to swear that he owns it but that "no other person is the owner thereof," must be understood not to exclude one's claiming and swearing to less than the whole of what is seized; for he may own but a small part, and the most of the property

¹ Four hundred and twenty-two Casks of Wine, 1 Pet. 547.

² "In such suits, the claimant is an actor, and is entitled to come before the court in that character only in virtue of his proprietary interest in the thing in controversy; this alone gives him a *persona standi in judicio*. It is necessary that he should establish his right to that character as a preliminary to his admission as a party, *ad litem*, capable of sustaining the litigation. He is, therefore, in the regular and proper course of practice, required, in the first instance, to put in his claim, upon oath, averring in positive terms his proprietary interest. If he refuses so to do, it is a sufficient reason for the

rejection of his claim. If the claim be made through the intervention of an agent, the agent is in like manner required to make oath to his belief of the verity of the claim; and, if necessary, he may also be required to produce and prove his authority before he can be admitted to put in the claim." The United States v. 422 Casks of Wine, 1 Peters, 549; Steamboat Burns, 9 Wal. 239.

³ The Adeline and Cargo, 9 Cr. 244; The Sally and Cargo, 1 Gal. 401; The Lively and Cargo, Id. Gal. 315; The boat Eliza and Cargo, 2 Gal. 11.

⁴ The Sally and Cargo, 1 Gal. 401.

⁵ The Bello Corrunes, 6 Wheat. 152; The Antelope, 10 Wheat. 66; The London Packet, 1 Mason, 14.

seized may belong to others. What he should aver and swear to is just what is true; if he owns but a moiety he must swear to that, and that no other person is owner of his part. Even if authorized by the owner of the other moiety, who is absent, to represent his interest, the claimant should swear to his own interest as his own, and to his principal's interest as his principal's. The filing of a general claim for the whole property seized by the owner of a part, has been judicially reprobated.¹ Even the master of a vessel may not appear for the owners, if they reside near the place of trial.² A partner may claim for, swear for, and enter into stipulation for his firm,³ because there is unity in the partnership.

If the claim sets forth no interest, or if the affidavit and security for costs be wanting when made a condition of appearance, the claimant will not be considered as in court.⁴ An allegation of interest is essential, as otherwise the appearer would be a mere trifler taking up the time of the court and hindering the administration of justice for no purpose. And if any one would go to law as claimant of a thing under arrest, he ought to bear his share of the responsibility; and, since he may be a non-resident, or, better, since two persons are safer than one, he should give security for costs. The only exception to the rule is that a claimant might appear *in forma pauperis*, as he might in a personal action.

§ 77. **When Interest need not be Sworn to.** When the ownership at the date of the seizure is alleged by the complainant, in his libel or information, need the claimant aver it too, and swear to it? He should not be required to prove, as against the libellant or informant, that which the latter has himself alleged. There is, in such case, no issue of fact between them, as to the ownership. If, in the information, a box of cigars is described as having been brought from Havana to New York, and landed, without payment of duty, by A., who was in possession at the time of the seizure, and who was the owner at the time of the forfeiture by the committal of the offense, it is

¹ *Stratton v. Jarvis and Brown*, 8 Peters, 4.

² *Spear v. Place*, 11 How. 522.

³ *Hills v. Ross*, 3 Dal. 331.

⁴ *United States v. 422 Casks of Wine*, 1 Pet. 549.

clear enough that the government could not complain, if A. should not swear to his ownership at the time stated and to his possession at a later date, as alleged. The allegation by the informant of the claimant's ownership to the time of forfeiture, (when the government succeeded him in the ownership, by operation of law, if the forfeiture is subsequently decreed to have taken place as alleged in the information,) is sufficient for A. so far as the government is concerned; for, if no other parties appear, he must get the goods under this pleading, in case they be not condemned. But, in such case, how would it be if he should have a rival claimant, who has alleged ownership of the box, sworn to it and proved it? If the thing shall turn out to have been erroneously charged, then it has not been forfeited, and might have become the property of the rival claimant, even since importation, and before or after the seizure—for A. might have sold it at any time. In the case last suggested, the restoration ought to be to A.'s rival, notwithstanding the allegations of the government that the box of cigars belonged to A. Even if it had not changed ownership since the allegation in the information was made, if it belonged to the rival claimant before it was brought from Havana, its fate could not be affected by such allegation, in case of restoration. Such an allegation, not being necessary to the information, (since it is not the business of the government to know anything about the ownership of an article prosecuted by the civil action *in rem*,) would not enter into the side contest between A. and his rival.

It is necessary, (to answer the *quere* propounded above,) that the claimant should swear to ownership, and prove it on the trial, so as to protect his rights against rival claimants, should any appear; but, with respect to the government, he need not swear to ownership when the government has already averred it, or proved it,¹ except in admiralty cases, and there merely to comply with the letter of the admiralty rule.

But, though he need not prove this, he must take his place in the cause as claimant, notwithstanding the averments of the information: he must place himself in a position to be con-

¹ The Acorn, 2 Abbott's U. S. R. 434.

demned to costs, in response to the notice, and show a willing disposition to abide by the judgment of the court, or he will be held in contumacy; presumed to have abandoned all pretence to the forfeited property; and he will be finally cut off by the decree of condemnation of the thing and the default and confession of all persons. Whether his ownership is stated by the libellant or informant or not, he must take his stand in court, if he would litigate; for, as Judge STORY said,¹ "The claimant is an actor, and is entitled to come before the court in that character, only in virtue of his proprietary interest in the thing in controversy;" he is not acted upon; the *res* remains the object of attack after the claimant's appearance as before; it is still the personified defendant, and the entry of the new actor does not make the case *inter alias partes*, as the courts have thought. He is an affirmative pleader and should be answered. He may be met by exception, demurrer, or any proper plea, as the libellant may be. His position must not be confounded with that of the thing proceeded against. Now the reason given by Judge STORY is not avoided, and the necessity of appearance removed, by the informant's averment of the claimant's proprietorship, since such averment does not place the claimant in court, does not subject him to liability to costs, does not relieve him from the danger of being pronounced in contumacy and default, and does not give him a right to answer and defend for the thing seized as forfeited.

If the complainant's allegation of the claimant's ownership in a thing seized as guilty, does not relieve the owner from claiming, though it does relieve him from proving ownership, the same principle is true when a thing seized as hostile, such as land belonging to an enemy, is alleged by the government in the information, to belong to some enemy mentioned by name. The owner of the land must respond to the notice, appear in time, deny that he is an enemy, take his standing in court to abide by the decree, file his claim, make such answer to the accusation of the land as he may choose, or no answer at all: for, if he should not appear, he will be pronounced in con-

¹ United States v. 422 Casks of Wine, 1 Pet. 547.

tumacy and default, and the information taken *pro confesso*, and a decree of condemnation will be entered against the land, and that judgment will be *res adjudicata* against him and all persons, and he will be forever debarred from setting up any claim to that land, in the forum where it is condemned, or in any other. All these are the inevitable results of the owner's not appearing as claimant, (if the government should prosecute the case to condemnation,) just so surely as the courts enforce the law as it is.

The claimant himself should, as a good pleader, prefer to have the jurat to his claim, even if not required by any rule of court, for the reason that the libel or information is sworn to, or presented by a sworn officer; and the claimant should make as good *prima facie* showing as his antagonist.

The test may be by affirmation, of course: the term "oath" is used in a general way, since it is unnecessary to present both terms disjunctively, as the legal reader will not find such verbal particularity necessary in this instance.

§ 78. **The Claim.** There is no procrustean form for either the claim or the oath. Nor is there any for the stipulation.

The time of filing the claim is usually fixed by the publication notice. In law cases it is sometimes the third Monday from the first date of advertisement. In admiralty, fourteen days are fixed by the rules. But, should default not be pronounced, the claimant may appear after the third Monday, or after the two weeks, as the case may be; he may appear at any time before trial, though not after default, unless he have the default set aside upon rule; and he runs the imminent risk of being defaulted at any moment after the time of the notice has expired, and of thus being forever cut off from all opportunity for claiming his property.

In a case¹ where the property proceeded against was several lots of land, all seized as the property of Semmes and so alleged in the libel, two of the lots really belonged to another person; and he had failed to claim and had been defaulted; but, by consent of the libellant, the District Court had permitted him to appear

¹ Semmes (Pl. in Er.) v. United States, 91 U. S. 21, 25.

and claim. The Supreme Court said, (without dissent,) that he would have been remediless had not this opportunity been afforded. If the proceedings had gone on to condemnation, the true owner of the two lots would have lost them, for failure to claim. He could not stand silent and afterwards obtain relief from the fact that the government as libellant had erroneously alleged all the lots to belong to Semmes, and that therefore his own interests could not have been affected; for the *res* was the land, which when condemned, would have carried with it the interests and title of all persons whatsoever.

The claimant must have really the interest or right of property which he sets up, since otherwise he would not be allowed to defend it. It was held that the assignment, by the builders of a vessel, of the money to become due on the building contract, did not invest the assignee with such proprietary interest as would enable him to appear as claimant and to defend the *res*.¹

The claim should be distinct and accurate in its statement of ownership or proprietary right, or of whatever of the *res* is claimed, but it should not contain the defensive pleading.

§ 79. **The Answer.** The answer should be a paper separate from the claim, though no great harm would ensue if both be conjoined. It need not be of great length or formality, but it should answer articulately the charges made articulately;² and under oath.³ A general denial to each charge would put the whole at issue. A general denial of one, and a special defense against another article of accusation would be good in an answer. Besides, once in court as claimant, the owner may, by way of defending his property, resort to exception, demurrer and any civil plea appropriate to the case. And the contest between the litigants now becomes so much like that in a case *in personam*, that it need not be dwelt upon here.

Interrogatories may be propounded by the libellant or informant, who is the prosecutor of the thing, or by the claimant, who is a plaintiff so far as he has the affirmative of the issue

¹ Revenue Cutter, No. 1, 1 Brown's Ad. 76.

² The Boston, 1 Sum. 330.

³ Gammell v. Skinner, 2 Gal. 45.

relative to the ownership of the property; and the manner and matter of the interrogatories in actions *in rem* do not differ from those in other classes of actions where the practice of propounding them prevails.

The answer to a proceeding *in rem*, is governed by rules few and simple. It should be respectful;¹ it should be pertinent and responsive to the charges made against the thing;² it should not contain contradictory allegations;³ nor be in the nature of a cross-bill.⁴ It is not necessary, in order to answer all the articles of the libel, that the answer should state minute facts beyond what is necessary to make the issue.⁵ Even matters ordinarily necessary may be waived.⁶

§ 80. **Intervention.** The intervenor is usually one who asserts a *jus ad rem*, while the claimant sets up a *jus in re*; though this difference does not always exist. One who should come into court, after the claim of another has been filed, and should also claim to own the *res*, would be a claimant rather than an intervenor: for there may be many claimants of a single thing, and they may be joint or antagonistic claimants; and there may be many intervenors, with a variety of interests agreeing with each other, or discordant.

He who comes between the parties already in court, and asserts some right which he prays to have adjudged, as, for instance, that he has the seaman's lien upon a ship for his wages, in a case against the ship, is strictly an intervenor. He has a right *in* the ship but not a right *to* the ship. In an admiralty seizure of a thing indebted, it is common for creditors to come in numerously as intervenors to have their bills allowed. Underwriters frequently come in as intervenors to protect the interests of insurers in cases of salvage, etc. All such intervenors are sometimes termed claimants by the courts.⁷

¹ The Pioneer, 1 Deady, 58.

² The California, 1 Sawyer, 463; The Gustavia, Blatchf. & H. 189; 1 Olcott Adm'r, 130.

³ The Bark Olbers, 3 Ben. 148.

⁴ Ward & Clement v. Chamberlain & Crawford, 21 How. 572.

⁵ The Steamship Western Metrop-

olis, 2 Ben. 212.

⁶ The Steamship Ville de Paris, 3 Ben. 276.

⁷ The Ship Packet, 3 Mason, 255; The Boston, 1 Sum. 328; The Henry Ewbank, 1 Sum. 400; The St. Jago de Cuba, 9 Wheat. 409; The Mary Anne, 1 Ware Rep. 104.

In the case of the *Mary Anne*, in which the owners did not respond to the notice and refrained from claiming and allowed themselves to be defaulted, certain creditors came into the case and claimed a lien as attaching creditors prior to the seizure. Judge WARE calls them "intervenorers" sometimes in his opinion, and he sometimes calls them "claimants." Seamen and material men, though not seeking a decree of forfeiture, often became the libellants of a vessel; and, in seeking such rights, after some other party has seized and libelled, they may become claimants of their dues rather than intervenors. Sometimes sailors and others may wait till after a decree of forfeiture, and then intervene to have their rights adjudged in the judgment of distribution, after the sale of the thing. But Judge WARE, in the case of the *Mary Anne*, with regard to the claim of the attachment creditors, said, "It is not a claim like that of seaman's wages, or that of material men, which overreaches the forfeiture. The attachment operates only to the extent of the debtor's interest, to whose rights, so far as the lien goes, the attaching creditor succeeds, while the maritime lien of seamen for their wages, and of material men for supplies and repairs is a species of proprietary interest in the thing itself, which is independent of the title of any particular individual. It inheres in the thing, whosoever may be the owner. But the interest of an attaching creditor can only be defended by the same means which will be a defense for the owner whose interest is attached; that is, in this case, by showing that no forfeiture has been incurred. To decide that he cannot make himself a party to the cause before a decree upon the merits, is to decide that he cannot be admitted to defend his rights at all. My opinion, upon the whole is, that the claim may be admitted."

Such a lien would not be maintainable, however, in a prize court, either by way of claim or intervention.¹

It may be stated, as a rule, that in all matters where the lien or right of whatever character, does not follow the proceeds and rest upon them, there must be an appearance by way of claim

¹ The *Eenrom*, 2 Rob. 1; The *Tobago*, 5 Rob. 221; The *Marianna*, 6 Rob. 24; The *Frances*, 8 Cr. 418.

or intervention, prior to the decree. In addition to the illustration of liens following the proceeds, given by Judge WARE in the case quoted above, (that of seamen for wages, and material-men for repairs, etc.,) there may be instanced the costs of court, fees of the district attorney and proctors, and fees, costs and expenses of the marshal, which are allowed in the judgment of distribution, after the decree of condemnation, and need not be asserted before; as, indeed, they cannot all be, since they would not all have accrued prior to the condemnation.

Courts may always, in their discretion, extend the time for answering, after the claimant has appeared in response to the invitation of the notice, and made himself a party; and they are usually liberal in this respect, and should be so, upon any proper showing.

Under the Tennessee code, it was held too late for an intervenor to appear in an attachment case, after the *res* had been replevined.¹

§ 81. **Bonding.** The claimant, after appearing in time and pleading, and making stipulation for costs and expenses, and giving security, has the right, as a general rule, to bond the *res*.² After appraisement, the claimant must, if he wishes to get possession of the property proceeded against, bind himself with good surety or sureties, in a sum sufficient in the estimation of the court, to fully protect the interests of the libellant. This sum secured by bond stands in the place of the *res*, and the rights of the stipulators are subject to the same powers as might be exercised by the court over the property if still in its custody.³ And the valuation of the property is binding in the appellate court, and the bond considered there as standing still in the lower court as a substitute for the property.⁴

The well settled doctrine that no one not a party litigant in the court of the first instance, can remove a case to a higher

¹ Ferguson v. Vance, 3 Lea, 90.

³ The Palmyra, 12 Wheat. 1.

² The C. F. Ackerman, 14 Blatchf. 360; The Blanche Page, 16 Blatchf. 1. See People v. Wayne Circuit Judge, 39 Mich. 15; United States v. Ames, 99 U. S. 35.

⁴ Houseman v. Cargo of the Schooner North Carolina, 15 Pet. 40; The Virgin, 8 Pet. 538; United States v. Ames, (9 Otto) 99 U. S. 35.

court, must be recognized as established law. It is thus stated by the Supreme Court: "Writs of error to remove the judgment of an inferior tribunal to this court are, under the acts of Congress, governed by the principles and usages of the common law. And it is very well settled in all common law courts, that no one can bring up, as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below; nor can any one be made a defendant in the writ of error who was not a party to the judgment in the inferior court."¹

The requirement that the answer must be responsive to the articulated allegations of the information, and the liability of answers to be excepted to for insufficiency, would be meaningless if there need be no answer at all.² Failure to answer places the owner of seized property in the position of the rest of the world, when the information is taken *pro confesso*, and all persons pronounced in contumacy and default, and when final decree of condemnation follows.

Though it was held, in Michigan, that part owners of vessels are, by construction of law, parties to a suit *in rem* against their ship;³ yet, they are not parties in such sense as to be liable to have personal judgment against them, even for costs, in case they do not choose to appear as claimants and enter into stipulation. They are, by virtue of the seizure and publication, parties in the sense in which all the world are parties. If their ownership is, in such a case, alleged by the libellant, they would be relieved from making affidavit to that fact, in case of their appearance as litigants, so far as concerns their contest with the libellant. Of course, one of a firm may represent all.

¹ Connor v. Peugh's Lessee, 18 How. 395; Payne et al. v. Niles et al., 20 How. 219; Davenport v. Fletcher, 16 How. 142.

² The California, 1 Sawyer, 463.

³ Mitchell v. Chambers, 43 Mich. 152.

CHAPTER IX.

JURISDICTION OVER THE PROPERTY SEIZED.

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§ 82. **In the Federal Courts.** Congress, in the exercise of its constitutional power "to constitute tribunals inferior to the Supreme Court,"¹ has given to the District Courts original jurisdiction, among other things, of all suits for forfeitures incurred under any law of the United States; of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it,² and of all seizures on land and on waters not within admiralty and maritime jurisdiction.³ And such jurisdiction is exclusive, except in the particular cases where the Circuit Courts have concurrent jurisdiction of causes and seizures, as under the insurrectionary act of Aug. 6, 1861.⁴

The District Courts also have jurisdiction, concurrent with the Circuit Courts, of all suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject, to the payment of any such tax, any real estate owned by the delinquent, or in which he has any right, title or interest;⁵ and some of the proceedings prescribed are analogous to those *in rem*, while others are *in rem*.⁶ They also have jurisdiction of all cases arising under any act for the punishment of piracy, when no Circuit Court is held in

¹ Const. Art. I., § 8, clause 9.

² *Schoonmaker v. Gilmore*, (12 Ot. to, 102,) U. S. 118.

³ U. S. Rev. Stat. § 563

⁴ Id. 563, 5308.

⁵ U. S. Rev. Stat., 563, 3207.

⁶ U. S. Rev. Stat. § 3453.

the district where such a case arises; and the proceedings against piratical ships are *in rem*.¹

The Circuit Courts have original jurisdiction, concurrent with the District Courts, in cases arising under the insurrection act of Aug., 1861, and cases to enforce equity liens for the Internal Revenue tax, as above mentioned; exclusive original jurisdiction of seizures under the laws for the suppression of piracy, (with the exception before given;) and of all suits arising under any law for the suppression of the slave trade,² under which vessels are forfeited for being built and equipped for such trade,³ for transporting slaves,⁴ for having on board persons to be made slaves and hovering on the coast, etc.⁵ Most of the cases of forfeiture, in the Circuit Courts, are personal actions to recover penalties.

The Circuit Courts have appellate jurisdiction of all causes of admiralty and maritime jurisdiction except prize proceedings,⁶ from the District Courts, where the pecuniary value of the thing adjudicated exceeds the sum of fifty dollars, exclusive of costs.⁷

The Supreme Court jurisdiction over proceedings *in rem* is wholly appellate, unless we conceive a case in which a state might be the complainant, or some other extreme supposition, to bring the cause under the very limited original jurisdiction of that court. Prize cases are appealed from the District Courts directly to the Supreme Court: the *res* remaining with the tribunal of first resort still subject to orders there for its preservation, and even for its sale; and, in some instances, the proceeds may be partially distributed by the District Court, while the case is pending on appeal.

As a general rule, personal offenses within the admiralty jurisdiction are cognizable by the Circuit Court,⁸ while civil forfeitures are declared by the District Court, which possesses all the original civil powers of admiralty, both on the instance and prize sides.⁹

¹ U. S. Rev. Stat., § 4796.

² U. S. Rev. Stat., § 629.

³ *Id.*, § 5551.

⁴ *Id.*, § 5553.

⁵ *Id.*, § 5555.

⁶ *The Panama*, 191, U. S. 458.

⁷ R. S., § 631.

⁸ *United States v. Coolidge*, 1 Gal. 488.

⁹ In the case of *Gelston v. Hoyt*, 3

The jurisdiction of the District Court is divided into, (1,) that of law; (2,) that of admiralty. Under the first, seizures made on land, under the revenue laws, for example, are recognized; under the second, seizures made on navigable waters, etc., and either found within, or brought within the district, are acted upon.¹

The admiralty jurisdiction, again, is divided into, (1,) the instance side; (2,) the prize side.² The latter covers all cases of naval captures in war upon the seas, rivers, etc., while the former includes all admiralty cases that are not prize of war.³

"It seems," said the court in *U. S. v. Grush*,⁴ "that the admiralty and common law courts have concurrent jurisdiction where an arm of the sea, or creek, haven, basin or bay, is so narrow that a person standing on one shore can reasonably discern and distinctly see, by the naked eye, what is doing on the opposite shore." The territorial jurisdiction of the admiralty is now too well settled to admit of much discussion. It extends a marine league from the shore, not including the shoals.⁵

The admiralty side has jurisdiction under the non-importation laws of the United States.⁶

Whether any given case is of law or of admiralty jurisdiction, becomes important as governing the proceedings to follow the seizure; for though the pleadings and proceedings *in rem* are much the same in both law and admiralty cases upon for-

Wheat. 246, 312-13, Mr. Justice Story, in delivering the opinion of the court with reference to the question "can a State court of common law entertain and decide the question of forfeiture," says: "This is a question of vast practical importance; but in our judgment, of no intrinsic legal difficulty. By the constitution, the judicial power of the United States extends to all cases of law and equity arising under the constitution, laws and treaties of the United States and to all cases of admiralty and maritime jurisdiction; and by the judi-

ciary act of 1789, c. 20, § 9, the district courts are invested with exclusive original cognizance of all seizures on land and water, and of all suits for penalties and forfeitures incurred under the laws of the United States."

¹ *The Sarah*, 8 Wheat. 391.

² *The Admiral*, 3 Wall. 609.

³ *Vide, post*, Chap. XLIX.

⁴ *United States, v. Grush*, 5 Mason, 290.

⁵ *Soult v. L'Africaine*, Bee, 204.

⁶ *Clark v. United States*, 2 Wash. c. 519.

feitures, yet, in the former, the trial of issues joined must be by jury, while it is not required in the latter, except that either party may, upon application to the court, obtain a jury trial in a case of contract or tort concerning coasting vessels, as more fully stated in U. S. Rev. Stat. § 566.¹

Nice questions have arisen from time to time, as to the proper bounds between admiralty and law jurisdiction.²

§ 83. **In the State Courts.** Actions brought directly against property in the state courts are generally in vindication of a *jus ad rem*. In the enforcement of the mortgage lien when no personal judgment is sought; in the attachment of the property of an absent, concealed or absconding debtor; in proceedings by, or in behalf of, creditors of a decedent against the property he has left, while his heirs have not yet accepted the succession with its liabilities; in tax suits against things indebted by assessment; in actions authorized by statute against property primarily responsible for rent; in the enforcement of various other liens upon property, the jurisdiction of the state courts, (within the line dividing it from that of the national courts,) against the things lawfully seized within their respective bailiwicks, is undoubted. Such jurisdiction is not always commensurate with that of the federal courts, owing to the restrictions imposed by statutory provisions with regard to the published notice; but where the publication is authorized to be addressed to all persons, and is so addressed, the jurisdiction is not confined to the thing with respect only to some named debtor, but it covers the rights in the thing by whomsoever they may be held.

The states, within their sphere, are not inhibited from making their vindication of the *jus ad rem* as wide-reaching as the federal government's enforcement of that right in actions upon affreightment contracts, bottomry bonds, and the like. Indeed, there are many cases in which the state courts have said of an action that it is *in rem* and therefore good against all the world;

¹ Gillet v. Pierce, 1 Brown's Ad. 553.

² The Plymouth, 3 Wall. 20; The Belfast, 7 Wall. 637; Warring v.

Clarke, 5 How. 441; Vose v. Cockroft, 44 N. Y. 415; St. Bt. Josephine, 39 N. Y. 19; The Hine, 4 Wall. 555; Ex parte Graham, 10 Wall. 541.

and doubtless such is the case when all the world have had an opportunity of appearing to assert rights to or in the thing, provided there was, in such case, legislative authority for such procedure and for general publication.

In many cases, however, state courts have maintained that there must not only be jurisdiction over the thing seized but also over the person of its owner. While this is not true as a general principle governing proceedings *in rem*, it is so if the statute under which the action is brought so requires; and the result must be a mixed action, or rather two actions in one: a practice to be reprobated.

The state practice, in the enforcement of liens is very extensive; and, so far as it is *in rem*, it will be hereafter treated.

Were the *jus in re* more generally vindicated by the action *in rem* with universal notice, by the states, there would be found no inhibition in the federal constitution, except the exclusive lodgment in the national courts of the classes of practice stated in the preceding section. Property used as the instrument of violating state law, might be seized and prosecuted as an offending thing irrespective of its owner, under a statute ordaining forfeiture as the penalty for such illegal use. There would seem to be no constitutional reason why bawdy, gambling and unlicensed drinking establishments, including the furniture, the houses and the ground on which they stand, should not be rendered liable; and a resort to this method might prove effective in the exercise of the governmental police power, and in "the promotion of the public welfare."

The general principles governing the jurisdiction over the subject matter, the exercise of jurisdiction, exhausted jurisdiction, power to determine the rights of lien holders, and presumptions as to the lawfulness of jurisdiction after it has been exercised, discussed in this chapter, are generally applicable to the state practice as well as the federal. However different the terms used, there must be substantial compliance with all the requisites—the first and most important of which is that the court must have power over the thing to hear and determine concerning its *status*.

Territorial jurisdiction *in rem* includes maritime as well as

all other causes in which the direct remedy against things is the proper one, wherever Congress has conferred the power.¹

§ 84. **Jurisdiction over the Subject-Matter.** It is essential to the validity of all proceedings *in rem* that the court have jurisdiction of the subject-matter.² Jurisdiction in general, is the right to hear and decide a cause;³ in the system under consideration it is the authority to try and determine the *status* of a thing seized and lawfully proceeded against. The question of authority is whether the action required of the court is judicial or extra-judicial; whether the tribunal has authority of law to decide the issue presented; whether, as a test, the court would be bound to decide in favor of the complainant, (or the plaintiff in a personal action at law,) on demurrer to the jurisdiction.⁴

If the court have no authority to proceed, its judgments and decrees would be *coram non judice*; and, if it have no right and power over the subject-matter, its jurisdiction may be inquired into.⁵

Jurisdiction, in a case *in rem*, is of different signification at different stages of the proceedings.

1. When there has been information filed before seizure, with prayer for seizure, the power of the court is confined to

¹ The Panama, (11 Otto,) 101 U. S. 453.

² Goodman v. Niblack, (12 Otto,) 102 U. S. 556; McKeever v. Ball, 71 Ind. 398, 406; Worthington v. Duncan, 41 Ind. 515.

³ Grignon's Lessees v. Astor, 2 How. 338; Beauregard v. New Orleans, 18 How. 502; S river's Lessee v. Lynn, 2 How. 43, 60; United States v. Aredondo, 6 Pet. 709; Voorhies v. Bank of the United States, 10 Pet. 474; State of Rhode Island v. State of Mass., 12 Pet. 718; Florentine v. Barton, 2 Wal. 216; Comstock v. Crawford, 3 Wal. 404; Callen v. Ellison et al., 13 Ohio State, 452; Sheldon v. Newton, 3 Ohio State, 494; Shroyer v. Richmond, 16 Ohio State, 455; Wilder v. City of Chicago, 26 Ill. 182;

Dequindre v. Williams, 31 Ind. 456; Smiley v. Samson, 1 Neb. 56; Mulford v. Stalzenback, 46 Ill. 307.

⁴ Morse v. Gould, 11 N. Y. 281; Jackson v. Babcock, 16 Id. 246; Gibson v. Roll, 30 Ill. 172; Johnson v. Johnson, Id. 215; Goudy v. Hall, Id. 109; Mason v. Messinger, 17 Iowa, 268; Grignon's Lessees v. Astor, 2 How. 338.

⁵ Dynes v. Hoover, 20 How. 65, 80; Shriver v. Lynn, 2 How. 43; Elliott v. Piersoll, 1 Pet. 328; Thompson v. Tolmie, 2 Pet. 157; Wilkinson v. Leland, 2 Pet. 627; Morris v. Hogle, 37 Ill. 150; Congar v. Galina, etc., 17 Wis. 477; Miller v. Handy, 40 Ill. 448; Clark v. Thompson, 47 Ill. 27; Haywood v. Collins, 60 Ill. 328; Osgood v. Blackmore, 59 Ill. 261.

the granting or withholding of the writ, and the power is then only hypothetical.

2. When seizure has been made, and the *res* brought into court, the power of the court is confined to the custody of the *res*; the sale of it, when perishable, (that its form may be changed to money;) and to other necessary orders.

3. When the libel has been filed, and notice given, and the legal delay has expired, (whether there has been any response to notice or not,) jurisdiction to hear and determine the *status* of the *res*, arises.

4. The extent of the jurisdiction to determine the *status* of the *res* is measured by the extent of the notice, (meaning both publication and the presumption of the knowledge given by the seizure itself;) for, though the whole *res* be nominally condemned, the condemnation could not be *res judicata quoad omnes* unless all had had an opportunity of being heard; and this is so for want of jurisdiction over whatever of the *res* belongs to such unnotified persons.

5. Jurisdiction over rights in a thing, so as to divest them, does not arise upon seizure of the thing, but upon default of the lien holders, after notice or upon their appearance: so, the nominal condemnation of the *res* does not reach such right at an earlier stage.

§ 85. **Exercise of Jurisdiction.** A plain line must be drawn between jurisdiction and the exercise of jurisdiction. A court may have the right and power to determine the *status* of a thing, and yet it may exercise its authority erroneously. After jurisdiction has attached, in any given case, all that follows is exercise of jurisdiction. The right to inquire into the jurisdiction, by another court, in a collateral action, is confined to the question of authority to hear and determine the cause, just as in a personal action, and it does not extend to the question whether or not the court erred in the exercise of lawful authority to act. It is only void judgments that may be attacked collaterally;¹ where they are only voidable—where the

¹ Hobart v. Frost, 5 Duer, 673; Butler v. Potter, 17 Johns. 145; Easton v. Col'ander, 11 Wend. 90; Mygatt v.

Washburn, 15 N. Y. 316; Bailey v. Buel, 59 Barb. 158; People v. Supervisors, 11 N. Y. 563; Freeman v

proper court has decided improperly—the remedy is by resort to a higher court; and when the highest is reached, the law gives no further remedy. By “proper court” is meant not merely a duly constituted tribunal, but one having authority over the subject-matter in the particular case questioned. When the judgment is *coram judice*, neither error of fact or of law in the exercise of jurisdiction will render it a nullity. It must stand until reversed by an appellate court.¹ “The cases are numerous,” said C. J. MARSHALL, “which decide that the judgments of a court of record having general jurisdiction of the subject-matter, although erroneous, are binding until reversed.”²

The political department of the government has power, under the constitution, to organize the courts. The legislative power may prescribe modes of procedure.³ In the distribution of judicial power, Congress has given to the District Courts the admiralty and maritime original civil jurisdiction, and cognizance of seizures on land for statute forfeitures; made them the international prize courts of this country, and given them exclusive original jurisdiction of seizures of enemy property under

Kenney, 15 Pick. 44; Lyman v. Fische, 17 Id. 231; Hannibal & St. Jo. R. R. Co. v. Schacklett, 30 Mo. 550; State v. Schacklett, 37 Mo. 280; Kemp's Lessee v. Kennedy, 5 Cr. 173; Knowles v. Muscatine, 20 Iowa, 249; United States v. Arredondo, 6 Pet. 691; Grignon's Lessee v. Astor, 2 How. 341; Griffin v. Mitchell, 2 Cow. 49; Rhode Island v. Mass., 12 Pet. 657.

¹ Walker v. Wright, 30 Iowa, 325; Milne v. Van Buskirk, 9 Iowa, 558; Martin v. Barron, 37 Mo. 305; Chase v. Christianson, 41 Cal. 253; Bond v. Pacheco, 30 Cal. 530; Elliott v. Piersoll, 1 Pet. 328; Alexander v. Nelson, 42 Ala. 462; Parker v. Kane, 22 How. 14; Southern Bank v. Humphreys, 47 Ill. 227; Davis v. Helbig, 27 Md. 452; Florentine v. Barton, 2 Wall. 210; Covington v. Ingram, 64 N. C. 123; Dequindre v. Williams, 31 Ind. 444.

² Ex parte Watkins, 3 Pet. 209. In the case of Tyler v. Defrees (11 Wall, 331, 344,) the Supreme Court of the United States said: “These proceedings do not come before us on a writ of error, to correct any irregularities or mere errors of law in the court which rendered the judgment, but they came before us collaterally as the foundation of defendants' title. According to the well-settled doctrine in such cases, no error can be regarded here, or could have been considered in the court below on the trial, that does not go to the extent of showing a want of jurisdiction in the court which rendered the judgment condemning the property. (See Cooper v. Reynolds, 10 Wallace, and the numerous cases there cited.)”

³ Miller's Ex. v. United States, 11 Wall. 268; Tyler v. Defrees, Id. 331.

the confiscation act of 1862, and concurrent original jurisdiction with the Circuit Courts under that of Aug. 6, 1861.

All the District Courts being competent, that one has jurisdiction exclusive and original, into the territorial bounds of which the seized chattel is first brought, or in which the seized thing, whether real or personal, is found: presence of the *res* gives jurisdiction.¹ "The only question of jurisdiction," said the Supreme Court in 18th of Howard, "is the power of the court over the thing—the subject-matter before them—without regard to the parties who may have an interest in it."

§ 86. *Coram non judice*. Where courts have no authority of law to act; where they have no jurisdiction over the parties, and where they have none over the subject-matter such as would enable them to divest owners' rights, the judgment is *coram non judice*.²

In determining whether a judgment is *coram judice*, we must not confound the erroneous exercise of rightful jurisdiction with the want of jurisdiction. It is only in the latter case that judgments are absolutely void because *coram non judice*.³ This distinction is observed in criminal cases as well as in civil.⁴ And it has been applied to the power or authority of

¹ Jecker v. Montgomery, 13 How. 515; Parker v. Overman, 18 Id. 140; Clark v. New Jersey Steam Navigation Co., 1 Story, 541; Monroe v. Douglas, 4 Sandf. Ch. R. 182; Pelham v. Rose, 9 Wall. 105; Hudson v. Gues-tier, 4 Cr. 293; The Nassau, 4 Wall. 634.

² Voorhies v. Bank of the United States, 10 Pet. 471; Shiver's Lessee v. Lynn, 2 How. 43, 60; State of R. I. v. State of Mass., 12 Pet. 657, 718; Grignon v. Astor, 2 How. 319, 338; Shroyer v. Richmond, 16 Ohio State, 455; Florentine v. Barton, 2 Wall. 216; Comstock v. Crawford, 3 Wall. 404, 406; Mulford v. Stanzenboche, 46 Ill. 307.

³ Dequindre v. Williams, 31 Ind. 456; Dynes v. Hoover, 20 How. 65,

80; Hobart v. Frost, 5 Duer, 673; Butler v. Potter, 17 Johns. 145; Prigg v. Adams, 2 Salk. 674; Henderson v. Brown, 1 Caine, 102; Easton v. Col-lender, 11 Wend. 90; Knowles v. The City of Muscatine, 20 Iowa, 248; Smith v. Keene, 26 Me. 411; Godard v. Gray, Law R. 6 Queen's B. 139; Milne v. Van Buskirke, 9 Iowa, 558; Walker v. Sleight, 30 Iowa, 310, 325; Martin v. Barron, 37 Mo. 305; Bond v. Pacheco, 30 Cal. 530; Chase v. Christianson, 41 Cal. 253; Ex parte Watkins, 3 Pet. 207-9.

⁴ Ex parte Lange, 18 Wall. 163; Rex v. Henworthy, 1 B. and Cress. 711, (8 Eng. C. L. 196); The King v. Ellis, 5 B. and Cress. 395, (11 Eng. C. L. 259); The King v. Bourne et al., 7 Ad. & El. 58, (34 Eng. C. L. 36);

assessors to levy taxes. Where they are destitute of authority to assess, the assessment is absolutely void;¹ but not when they merely commit errors in an assessment which they are legally empowered to levy.²

A court, having jurisdiction to decide upon the question of its own jurisdiction, may erroneously determine such a vital point. Should such court maintain jurisdiction when it really has none, must the ruling stand unless reversed by an appellate court? or may it be treated, in a collateral action, as *coram non judice* and therefore absolutely void?

It has been held that the erroneous ruling of such court with respect to its own jurisdiction, must stand till reversed, and that it is not questionable in a collateral proceeding.³ When the erroneous ruling is by a court of highest resort, so that it takes unwarrantable jurisdiction, the doctrine that it must stand as valid till reversed necessarily cuts off all remedy.

§ 87. **Exhausted Jurisdiction.** When a court has exhausted its jurisdiction over seized property or any subject matter, any further adjudication of it, or any subsequent disturbance of the judgment rendered before the jurisdiction was exhausted, would be *coram non judice*. When lower courts have finally acted upon a thing, by declaring its *status*, no further judicial declaring thereof can be done, except in an appellate court. If the time allowed for taking the cause to the appellate court has expired without its removal thither, all jurisdiction as to the *status* of the thing is forever exhausted.

Shepherd v. Commonwealth, 2 Met. 419; Elliott v. The People, 13 Mich. 365.

¹ Freeman v. Kenney, 15 Pick. 44; Lyman v. Fishe, 17 Id. 231; People v. Supervisors, 11 N. Y. 563; Mygatt v. Washburn, 15 Id. 316; Baily v. Buel, 59 Barb. 158; Han. & St. Jo. R. Co. v. Schacklett, 30 Mo. 550; State v. Schacklett, 37 Id. 280.

² Glasgow v. Rouse, 43 Mo. 479; The St. Louis M. L. Ins. Co. v. Charles, 47 Id. 462-7; Weaver v. Devendorf, Denio, 117; Van Ren-

sellaer v. Whitbeck & Sharp, 7 Barb. 133.

³ Hudson v. Gustier, 6 Cr. 281-5; Bradley v. Fisher, 13 Wall. 351; Fisher v. Hepburn, 48 N. Y. 41, 53; Coltman v. Beardsley, 38 Barb. 30, 51; Brittain v. Kennard, 1 Brad. & Bing. 432; Ex parte Watkins, 3 Pet. 202, 209; Supervisors, etc. v. Briggs, 4 Denio, 33, 34; Weaver v. Devendorf, 3 Id. 117, 120; Hennerson v. Brown, 1 Caine, 90; Rex v. Bolton, 41 Eng. Cr. L. 439; Cone v. Mountain, 1 Mann. & Gr. 257; Broom's Legal Maxims, 56-66.

But, if timely taken to the appellate court, the cause may be adjudicated there to the exhaustion of the power of that court. And the court of the highest resort, in like manner, exhausts its jurisdiction when it has heard and determined. Any further hearing and determining, (unless before the maturity of the judgment rendered and by way of new argument or new trial,) would be absolutely void.

When the Supreme Court of the United States has finally passed upon the *status* of a thing in a proceeding *in rem*, it cannot afterwards disturb the title to the thing which a purchaser has acquired by a sale to him properly made in furtherance of the decree. It cannot try and determine again, in a collateral action, the *status* of that thing which was before judicially declared—for jurisdiction to pass upon the *status* was exhausted when the *status* was determined. The purchaser took the shoes of the libellant in whose favor the *res* was condemned. The plaintiff in a collateral attack upon such condemnation and title seeks to fight the battle over. He is not in the position of an attacker of a personal judgment, rendered in a cause in which he was not a party, but his standing is that of a defaulted party—one against whom the condemnation of the thing is *res adjudicata*.

It may be said that if the Supreme Court should assume authority after the exhaustion of its jurisdiction, we are obliged to submit, since we can appeal to no higher tribunal. It is true that we must endure whatever wrong such assumption might produce in any suit; but, there is no presumption in favor of the rightfulness of judgments, provided want of jurisdiction is admitted or established. We must submit; but we are not precluded from showing the disorganizing tendency of such jurisdictionless action; we are not bound to presume that such action is right.

Should a sovereign be the wronged party, it seems clear that he would not, by any such presumption, be bound to submit without remonstrance. A sovereign cannot be sued *in personam*, but his private property enjoys no immunity from a suit *in rem*.

In an action *in rem* against *The Charkieh*, a vessel belonging

to the Khedive of Egypt, a sovereign prince, it was held by the High Court of Admiralty in England, that a suit *in rem* to enforce a damage lien may be entertained without any violation of international law, though the owner of the *res* be the sovereign of a foreign state, and that such a suit may possibly be entertained even against property connected with the *jus coronæ*. The decision was by Sir Robert Phillimore, in 1873.¹ It was stoutly contended, on the part of the Khedive, who had appeared under protest as claimant of the vessel, that he had immunity by reason of his sovereignty; but the court held that in a cause *in rem*, in which the sovereign was not personally sued, his property might be condemned to satisfy the *lien*; and there was condemnation.

§ 87. **Power to Determine Rights of Lien Holders.** Though there be lawful custody by the court, of the *res*, there must also be jurisdiction over the rights of all persons therein, which can only be after notice; and any prior exercise of jurisdiction over such rights would be *coram non judice* and consequently void.²

In cases of limited notice, such as attachment proceedings when they are *in rem*, some actions to foreclose mortgages, and the like, the court acquires jurisdiction over the rights of the notified debtor only; and any exercise of jurisdiction over the rights of unnotified persons would be *coram non judice* and void.³

In cases where notice is altogether omitted, except so far as a seizure from the owner creates the presumption of knowledge on his part and that of others interested, the exercise of jurisdiction is *coram non judice* and void,⁴ in its attempted divestiture of the rights of persons neither notified in any way nor presumed by law to know of the proceedings.

§ 89. **When Judicial Action is Presumed Lawful.** The presumption of law, subject to removal by showing previous exhaustion of jurisdiction or other grounds, favors the lawful

¹ *The Charkieh*, IV. English Admiralty and Ecclesiastical Reports, pp. 59-107.

² Post, Book IV., Part II., Chapters on probate, attachment and mort-

gage foreclosure proceedings *in rem*, with limited notice, and the authorities there cited.

³ Id.

⁴ Id.

exercise of jurisdiction, as a general rule;¹ but there are exceptions, as when unusual powers are exercised under a statute prescribing the mode of procedure² and when courts are of limited jurisdiction.³

Courts of general jurisdiction, when exercising special powers conferred by statute, must show of record the facts necessary to such jurisdiction, as, otherwise, the lawfulness of the exercise will not be presumed.⁴

¹ *Harvey v. Tyler*, 2 Wall. 328; *Voorhies v. Bank of United States*, 10 Pet. 449; *Davis v. Connelly*, 4 B. Monroe, 136; *Shumway v. Stillman*, 4 Cowen, 292; *Cox v. Thomas*, 9 Grattan, 323; *Bimeler v. Dawson*, 5 Ill. 536; *Bloom v. Burdick*, 1 Hill, (N. Y.) 130; *Sears v. Terry*, 26 Conn. 273.

² *Bryan v. Smith*, 10 Mich. 229; *Thatcher v. Powell*, 6 Wheat. 119; *Walker v. Turner*, 9 Id. 541; *Cleveland v. Rogers*, 6 Wend. 438.

³ *Ford v. Babcock*, 1 Denio, 158;

Sears v. Terry, 26 Conn. 273; *Frery v. Dakin*, 7 Johns. 75; *Morgan v. Dyer*, 10 Id. 161; *Mills v. Martin*, 19 Id. 7; *Dakin v. Hudson*, 6 Cowen, 221; *Otis v. Hitchcock*, 6 Wend. 433; *Stephens v. Ely*, 6 Hill, (N. Y.) 607; *Green v. Haskell*, 24 Me. 180; *Wight v. Warner*, 1 Doug. 384.

⁴ *Ransom v. Williams*, 2 Wall. 313; *Williamson v. Berry*, 8 How. 495; *Boswell v. Otis*, 9 Id. 336; *Eaton v. Badger*, 33 N. H. 228; *Gray v. McNeal*, 12 Ga. 424.

CHAPTER X.

THE JUDGMENT BY DEFAULT.

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§ 90. **Form of the Judgment.** The usual form of the judgments by default is as follows: "The delay allowed by law having expired, and no claim or defense having been filed, on motion [of the libellant's attorney or proctor] it is hereby ordered that all persons interested in the property seized herein be pronounced in contumacy and default, and the libel adjudged and taken *pro confesso*."

A full and accurate description of the property may be inserted, and the words "adjudged and decreed" may be added after "ordered," but such does not seem to be either usual or necessary. "Property seized herein and described in the libel" is sometimes preferred in the form. Where one claimant or more have appeared in time, they should be expressly excepted from the judgment. In such case, the following would be a good model: "The delay allowed by law having expired, and no claim, intervention or answer having been filed, except those by X., Y., and Z., on motion [of the Attorney of the United States, or of the attorney or proctor for the libellant or informant, as the case may be,] it is ordered, adjudged and decreed that all other persons having or pretending to have, any right, title or interest in or to the property seized and libelled herein, and fully described in the information [or libel] on file, be, and they are hereby, pronounced in contumacy and default, and the libel adjudged and taken *pro confesso*."

As the judgment is rendered on motion, in open court, it does not absolutely require the signature of the presiding judge, unless such is the rule of law governing such judgments at the place where the court sits. If the minutes containing such judgment be signed by the court, when the law in any place requires it, that is sufficient. It does not seem to be essential to its validity that it be signed at all, where there is other evidence, as good, of its authenticity. The absolutely necessary matter is that it be authoritatively rendered.

§ 91. **Expiration of Delay, as a Reason.** The expiration of the delay, given by the notice, within which anyone in the world might have appeared, is a reason given for the judgment.¹ The notice would be entirely a work of supererogation, if the time therein limited for appearances could be disregarded with impunity. He who has not appeared and entered into stipulation and set up his claim, is presumed to have no interest, or to have abandoned any idea of asserting it.

It is necessary that the cause should proceed; and, if the delay stated in the notice may be disregarded, and claimants may, after its expiration, come into court and assert claims at any time, no progress could be made towards an end of the litigation. As, in personal actions, the defendant must appear within ten days, or such time as the citation may allow, or stay away at his peril, so in actions against things and all persons having interest therein, the invited claimant must appear within the twenty or thirty days usually allowed, or be defaulted.

§ 92. **Contumacy and Default.** The contumacy pronounced against non-appearers is of ancient usage and rests upon the idea that they have shown contempt for the notice, and for the court which issued it. It places them under a ban which must be removed before they can ever be heard in the cause. While it is not such a judgment of contempt as is usually understood by an order punishing for contempt of court, it is yet nominally an expression of judicial displeasure at the non-appearance of those who may pretend to have rights yet decline to present them to such tribunal when notified so to do. Espe-

¹ Baldwin v. Brown, 2 Penn. 533.

cially, should a belated appearer afterwards come to ask the favor of the court that he be allowed to claim after the set time, would the judge be judicially indignant and require him, by giving good reasons for his delay, to purge himself of the contumacy.¹

Stress should not be laid upon the part of the form which declares the non-claimant contumacious, for the judgment by default would be good and binding without it.

The important matter is the default itself. The judicial declaration that the non-appearer, though notified as fully as though served with a personal citation, has not filed any claim to or in the thing seized, nor answer for such thing in its defense, is the vital part of the decree. It is the court, the authoritative tribunal which holds the *res* in its grasp, which thus solemnly adjudges all in default as to that thing, except those who have obeyed the call and asserted their title or lien or privilege.

§ 93. **Admission by Non-Claimants.** The order that the allegations of the libel be taken *pro confesso* is based upon the idea that silence implies consent. All who have not responded to the invitation to come may fairly be presumed to have assented to the charges made against their property, or to have no interest in it which they care to assert. The allegations are deemed admitted by them; just as emphatically so, for all the purposes of the action *in rem*, as though they had come personally into court and acknowledged the truth of the allegations. There is no longer any need of proving the allegations, so far as non-claimants are concerned, since they have no grounds left for complaint if the condemnation of the *res* should immediately follow their confession.²

¹ *Townsend v. Tallant*, 33 Cal. 45.

² *The Nassau*, 4 Wall. 634; *Scott v. Sherman*, 2 Wm. Bl. R. 977; 18 How. 140; 2 Yeates, 233-4; *Attorney General v. Norstedt*, 3 Price's Exchequer R 97; 3 Wheat. 322-3; 10 Wheat. 431. By making default and allowing the libel to be taken *pro confesso*, they admit all the allegations of the libel

to be true, and the court, as is said by the Supreme Court of the United States in *Miller v. United States*, 11 Wall. 268, 301, 303, 304, is as fully warranted in making a decree of condemnation as though the facts alleged in the libel had, on an issue, been expressly found to be true. Chief Justice Marshall, in *The Mary*,

In such case, there is no issue to go to the jury, even in a case at law. Juries can only render verdicts where there are issues joined. The *res* cannot join issue where there is no one claiming it and helping it in its defense. If all the world be defaulted, there is admission of the allegations of the information by all: so, if such admission be afterwards offered and received in evidence against the thing on trial, and condemnation of it should follow, there is no one in the world to complain of such decree—much less of the want of a jury to find a verdict as the basis of a decree.¹ Even in a criminal action, the plea of guilty dispenses with the necessity for a jury.²

If, in a criminal case, the accused stand silent, the court will have issue made by ordering the plea of “not guilty” entered, that the trial may proceed. Without such joinder, there would be nothing to submit to the jury. Since juries never render judgments, but merely verdicts, they cannot possibly render a verdict when there has been a confession of the plaintiff’s or prosecutor’s allegations, as there is no issue for them to try. This is true in actions *in rem* as well as *in personam*; at common law as well as in equity.³

Where one goes to trial without a jury, if no statute absolutely requires a jury, even where there is issue joined, the right of jury would be considered as waived.⁴

The confession has no effect upon claimants. If of several persons each professes to own the *res*, yet but one claims in court and all the others are defaulted and judgment taken

9 Cranch, 126, 142, says: “By the rules of the court the condemnation of the vessel was inevitable; not because, in fact, she was British property but because the fact was charged, and was not repelled by the owner, he having failed to appear and put in his claim.” See 35 N. Hamp. 132.

¹ The condemnation, on default of all parties, without a jury, was perfectly legal and proper. *Miller’s Ex. v. United States*, 11 Wall. 292; *Tyler v. Defrees*, Id. 331. And the same rule was laid down by Judge Ware,

in the *Mary Ann*. Ware’s R. 106; S. P. 35 N. Hamp. 132; 50 Barb. 385, 394.

² *The State v. Richmond*; 6 Fost. 247. See 12 Minn. 221.

³ *Sinclair v. Williams*, 8 Iredell’s Eq. Rep. 335; *Attorney General v. Carver*, 12 Iredell’s Eq. Rep. 231; *Manchester v. McKee*, Exr., 4 Gilman, 511, 517.

⁴ *Bank of Columbia v. Okely*, 4 Wheat. 243–4; *The Genesee Chief*, 12 How. 460; *The Madison & Indianapolis R. R. Co. v. Whiteneck*, 8 Ind. 217.

against them *pro confesso*, the claimant may go on with the prosecution of his claim without prejudice. It would be so, indeed, if the others should all appear in court and make open and solemn affirmative admission of all the facts alleged in the libel. If the claimant can make out his own case, he will have the *res* adjudged to him, notwithstanding the judgment *pro confesso* against the others: *provided*, the *res* should not be condemned as forfeited. He may, notwithstanding the admission of all the world (except himself) solemnly adjudged, stand as defendant for the *res* in court, and may succeed in preventing condemnation. He is not affected, either in his character as claimant, or in his character of appearer for the thing-defendant, by the judgment against all the rest of the world.

Nor is the *res* prejudiced by the default and confession of non-claimants, where there is a claimant, if the libellant fail to make out a case against it. In such case, if the claimant merely proves his title, but offers no proof in defense whatever, there would be restoration: for the admissions of all the rest of the world, though offered in evidence, would not bear upon him, nor upon the thing *as his*. The defaulted confessors themselves would not be affected by their non-appearance, if for any cause, the *res* should be not condemned.

§ 94. **Trial Contradictory with Claimants.** The trial of the *res*, conducted contradictorily with the one or more persons who have filed claim and answer, goes on just as though all others had not been defaulted. The libellant may file answers to their claims, where, under the practice of any court, issue would not be deemed as joined without it; and, on the other hand, they may each answer for the *res*, setting up as incongruous and discordant defenses, compared with each other, as may be conceived, since each is a separate pleader, averring a distinct interest.

The libellant offers the confessed allegations of the libel against the *res*, not to affect appearers, but to get judgment against the non-claimants; and he offers other evidence against the *res*, contradictorily with the appearers; and, if this be sufficient, there is condemnation good against all the world.

In the supposed state of things, there is issue joined. And

the right to trial by jury is conceded to the claimant, if the case be one at law. If it be that of a thing seized upon navigable waters, whether a prize capture or a revenue seizure, the case is in admiralty, and no jury is allowed. It was contended that cases under some of the war statutes passed during the rebellion, were *quasi* admiralty cases in which juries should be discarded, though the seizures might be on land; but it has been held to the contrary.¹

§ 95. **Proceedings Peculiar to Prize Causes.** Naval prize cases being always in admiralty, are always tried without jury, whether issue be joined or not. Whether any claim be filed or not, (for as we have seen, there may be a claim filed and yet no issue joined,) the conduct of the cause by the libellant is much the same. The evidence will be adduced, though there may have been a judgment and default *pro confesso* entered against all the world.

The reason of this is that prize courts are international tribunals; and, to the end that any nation which may feel itself aggrieved by an adjudication, may appeal to the government under which the prize court sat, for relief, it is required by international law that the evidence be taken, offered and preserved. As this evidence comes originally from the captured officers and others of the prize, and is seldom eked out by "further proof;" and is taken *ex-parte in preparatorio*, it will be seen that the whole practice forms an exception to the general rule. It has been thought by some eminent writers on international law, that prize courts are not courts in the proper sense of the term, (since enemies have no standing therein to contest the condemnation,) but that they are merely commissions for friendly claimants to set up their rights therein, and for hostile nations to examine therein, after war, the grounds of condemnation, to see whether they are in accordance with the *jus gentium*. But they are strictly what they profess to be: courts of nations. They do adjudge between the captor and the thing captured, after ascertaining the one necessary fact that the thing is hostile. Though the ascertaining of this one fact may require many

¹Ex parte Graham, 10 Wall. 541.

subordinate facts, yet usually it requires but one: the taking from the enemy. It is not proposed here to follow up this topic, but to relegate it to its proper place.¹

It would seem that, where the political power of a government, in war, should conclude to avail itself of the rule of nations to make unusual captures or seizures, (as that of enemies' private property on land,) a jury would be called to try issues of fact, contrary to the usual practice in courts of nations; and that the same reasons which require the taking and preserving of evidence in prize causes where there is no issue joined, would apply to cases under land captures and seizures as to those on the sea, where any adjudication at all is necessary.

The rule which precludes belligerent enemies from coming into courts of nations sitting in the country they are trying to destroy, is no argument to prove that such tribunals are not essentially courts. They are all notified, and could all come were they not enemies; and it does not lie in their mouths to plead that they are enemies. Should they come, they must first aver their allegiance to the country whose courts they enter, or to some friendly power. Should they plead that they are enemies, this would be a confession that the *res*, claimed by them is enemy property: the one fact rendering it confiscable.

§ 96. **Judgment Against Non-Claimants.** The default of non-appearers, will now be considered as really in the nature of a personal judgment, though occurring incidentally to a condemnation of an impersonal object. It differs little from a default in an ordinary personal action. If the defendant, in an ordinary action *in personam*, has been cited to appear and failed to do so in time, a judgment of default may be entered against him. This is precisely what is done when he has been notified by seizure and publication to come into court and defend the thing seized, and to set up any right, title, claim and interest, in the thing or to the thing. He fails to come: he is defaulted: he is as though a personal judgment by default had been entered against him.

In personal actions, the defaulted defendant usually is allowed two or three days, (the time being fixed by statute, and differ-

¹ Book, III.

ing in different states,) within which he may move to set aside the default, and be allowed to answer. In admiralty, in which the practice of defaulting non-appears before condemnation of a thing prevails, the time is much longer; even within a year a defaulted person has been allowed to set aside the default so far as it concerned himself, to put himself *rectus in curia* by accounting satisfactorily for not responding to the notice in time; and to answer, though a year had elapsed. But never after condemnation and sale is the defaulted person properly allowed to appear, to disturb the purchaser. Where the proceeds remain in the registry, he might, at the discretion of the court, be allowed to show any remaining right to them, if he could legally account for his tardiness, and could be accorded such rights without injury to others.

The judgment by default, against all persons not appearing in a proceeding *in rem*, is just as binding as any personal judgment against them individually; and, in those actions *in rem*, such as prize cases, in which the taking of the libel *pro confesso* and the defaulting of all non-claimants, may or may not be done, the condemnation of the thing operates as a conclusion of all their pretensions just as effectually as though there were a judgment by default against all; as, otherwise, the whole proceeding would be preposterous.¹

As the condemnation (whether after default against all persons except the claimants, or against all persons where there are no claimants, or after a judicial trial contradictory with the claimants,) is *res adjudicata*, the default becomes confirmed, and the judgment by default is as effective as a final personal judgment; as fully so, indeed, as if all persons in the world had been named in the judgment and individually decided against.² Suits *in rem* are not only against a thing, but also against "all persons having or pretending to have, any right, title or interest *in* or *to*" that thing. They are, in a sense, always personal actions, since all persons are notified, and all affected by the judgment.

But, if the default be not confirmed by the condemnation of

¹ *Miller v. United States*, 11 Wall. 298, 301, 303, 304.

² Vide, post, Chapter on Adjudication.

the *res*, it is as though it had not been rendered. In case the libellant should discontinue proceedings against the *res*, after default and before adjudication, no person would be affected by the judgment of default and confession. In a renewed proceeding, new notice would be requisite, and then all persons would be privileged to appear, notwithstanding the previous default entered against them in the first instance. So, if the proceedings be not discontinued but prosecuted to a final decree, if that final decree be for the restoration of the *res*, the judgment by default could not be said to be confirmed against the non-claimants, though the decree would be *res adjudicata* as to the libellant and the successful claimant. Could it be said, in such case, that the judgment in favor of the successful claimant, was rendered in his favor contradictorily with all non-appearers? Would it be contended that the court had been sitting to try property rights between disputants not really in court, when it is found that no grounds had existed for the condemnation of the property?

§ 97. **Default Set Aside Upon Proper Showing.** The setting aside of the default is an important subject. It has been already remarked that courts, in the exercise of a sound discretion, may allow a belated appearer to purge himself of contumacy, enter stipulation for costs, and file a claim between the time of the expiration of the delay nominated in the notice, and the time of the trial, upon his making a proper showing of the reason of his unavoidable delay, provided no interests have intervened which would be prejudiced by his late appearing. Such showing should be made under oath or affirmation; should be supported by other evidence when the court requires it;¹ should be conclusive as to his reason for tardiness and as to the fact that substantial justice requires that he be allowed to appear; should show that he has reasonable ground to believe that his claim or intervention is well founded;² and, the person thus appearing out of time should pay the costs up to the date of his application, in many conceivable circumstances; and he

¹ The David Pratt, Ware's R. 495.

² Miller v. Alexander, Coxe's Rep. 400.

should always, in any case, pay the additional costs which his tardiness may have caused. The costs required are within the discretion of the court.¹

More liberality is shown in admiralty courts than in others, towards tardy claimants.

By the 29th Admiralty Rule discretion is limited to the final hearing; and the tardy litigant must pay "all the costs of the suit" up to the time of his appearance. By the 40th Rule he may be allowed a re-hearing ten days after the decree.

In State practice, default, in a proceeding *in rem* with notice limited or otherwise, or proceedings *quasi in rem*, may be set aside, upon proper showing.²

§ 98. **Default, When Confirmed, is Final.** The confirmed default is final against all persons, like a personal judgment, or it is a work of supererogation and folly. What is the use of notice, and of the great importance attached to it as the very life of the action, if it may be disregarded with impunity? What is the use of declaring non-claimants in contumacy, if they are to be treated as not really contumacious? What is the use of one claimant's coming within time, if another can take his leisure in deciding what he is to do, and in availing himself of any new turn of events? What is the meaning of the solemn adjudication, if persons not only defaulted, but formally divested of all rights of property they may have had in the *res* adjudicated, may yet appear and treat the whole procedure as a farce?

There must be an end of litigation; and the non-claimant, when defaulted, should not, after the default has been confirmed, be allowed to get any relief in court, upon any showing; he should seek relief in such case of the legislative department, if he has been wronged.

Litigation must somewhere have an end. Whatever litigants have had the opportunity of having settled in a case; whatever

¹ *United States v. The Brig Malek Adhel*, 2 How. 210; 19 Equity Rule of United States Supreme Court; the 29th Admiralty Rule requires that all costs be paid to the time.

² *Pollard v. Wegener*, 13 Wis. 569; *Knox v. Miller*, 18 Wis. 397; *Rape v. Heaton*, 9 Wis. 328; *McBride v. Harn*, 52 Iowa, 80; *Aspern v. Lamar Ins. Co.*, 6 Ill. App. 235.

is at issue and is finally decided, cannot be reopened, since, were the doctrine otherwise, "all rights of persons and property would be afloat," and "the very foundations of society would be broken up, and endless, fruitless litigation is all that would be left."¹

All persons have the opportunity of having their rights settled in a proceeding *in rem* with general notice, so far as they concern the thing proceeded against. "All persons having an interest in the subject matter are parties, or may be parties, so far as their interest extends."² And one who neglects the opportunity of putting in his claim, and trying the point of forfeiture is guilty of *laches*, and shall forever be concluded by the condemnation, not only in respect to the goods themselves, but every other collateral remedy for taking them.³

¹ Patterson v. Bonner, 14 La. 233. 86; Christmas v. Russel, 5 Wall. 290,

² Gelston v. Hoyt, 3 Wh. 246. 312. 307; Clemens v. Clemens, 37 N. Y.

³ Scott v. Shearman, 2 Wm. Bl. 59, 74.

977: Syndics v. Nicholson, 4 La. 85,

CHAPTER XI.

THE FINDING OF THE FACTS.

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§ 99. **The Entered Confession Offered as Evidence Against the Property.** When the libel or information has been duly taken *pro confesso* against non-claimants it is sufficient proof, and condemnation may follow: *provided*, as a matter of course, the allegations of the libellant are such as to make out the case when they are admitted. The 29th Admiralty Rule, prescribed by the United States Supreme Court, expresses not only the rule in the branch of the law to which it authoritatively applies, but also the usage that prevails in all cases *in rem* for declarations of forfeiture. It is as follows: "Rule 29. If the defendant shall omit or refuse to make due answer to the libel upon the return day of process, or the day assigned by the court, the court shall proceed to pronounce him in contumacy and default; and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor."

This rule, as appears from the context, is meant to apply to both the suit *in personam* and that *in rem*. The 27th Rule

begins, "In all libels in causes of civil and maritime jurisdiction, *whether in rem or in personam*, the answer of the defendant to the allegations of the libel shall be on oath;" and the 29th is a continuation of the subject. The latter is given at length, to present what seems to be the right usage in all suits *in rem*: the proceeding of the court "to hear the cause *ex parte*" as to non-appears, after default, and "to adjudge the cause as to law and justice shall appertain."

Such hearing and adjudging must always follow default, but may be very summary indeed, since the confession establishes the facts which the court is to find. Nothing remains but the application of the law. If, at the hearing, *ex parte* affidavits are produced by the libellant, the court may receive and consider them with the confession. Oral evidence may be given; witnesses may be examined in court, at such hearing, but these additional evidences are seldom essential; and, it would seem that they are never so, since the allegations must be required to be complete; and therefore their admission, sufficient.

§ 100. **Interrogatories.** The default and confession of others being nothing against him who has appeared to claim and defend, the finding of the facts against him must be done contradictorily with him. So also must the finding of his alleged facts, be done contradictorily with the libellant. Either party may file interrogatories for the other to answer, and the answers must be made within a given delay, and under oath or affirmation, or they are liable to be taken *pro confesso*, and used in evidence as though affirmatively answered: affirmatively or negatively, as may be against the defaulting party interrogated. Of course, parties are not required to criminate themselves in answers, nor to subject themselves to forfeiture of property. In admiralty, they are specially protected against this by the 31st Rule. Should the libellant fail to answer proper questions, he may be defaulted and his libel dismissed, or he may be compelled by the court to answer, or the interrogatories may be taken *pro confesso* in favor of the defendant. When either is sick, absent from the country or otherwise unable to answer, the court may dispense with the interrogatories if it deem them unimportant, or may have them taken by commission when

practicable. Intervenors may interrogate either party or both, subject to like liabilities and restrictions. The parties defending may have the libellant pronounced in contumacy and default, and have the suit dismissed, if he fail to appear and prosecute.

It is needless to dwell upon the incidents of the trial and upon the subject of evidence, as they do not generally differ in actions *in rem* from ordinary causes.

§ 101. "Testimony in Preparatorio." Prize causes, however, differ so essentially from other causes, so far as the finding of the facts are concerned, as to require some attention in this connection.

The first noticeable peculiarity is that even in the absence of any claimant or defendant whatever, the taking of the libel *pro confesso* and the receiving of it in evidence, would not meet the requirements of international law. It would not be a sufficient hearing—not a sufficient finding of facts. The testimony of the captured officers, or some of them, and of others captured with the prize, taken *in preparatorio*, in answer to the prescribed list of interrogatories, is required for the satisfaction of neutral powers, who may wish to review the action of a court of nations sitting in a belligerent country, that they may, by treaty or otherwise, right any wrongs to which they or their subjects may have been subjected.

Though there is but one essential fact to be found—the fact that the *res* is enemy property—yet many subsidiary facts often underlie this, and are necessary to the proper establishment of the main fact. A ship captured in battle is fully shown to be enemy property by the proof of such capture. But the great majority of prizes are nominally neutral. The enemy character is made to appear by proof of the subordinate fact that the master or owner has, by its use, arrayed himself on the side of the enemy, and become an enemy-owner so far as the ship is concerned. Such a nominally neutral owner has standing in court, since his domicile creates a presumption in his favor; but his ship, if condemned for having broken blockade or like act, is condemned as the property of an enemy, and therefore clothed

with the enemy character. The like is true of all prize merchandise; of all prize things whatsoever.

The testimony *in preparatorio* is taken by prize commissioners, and is not examinable by the parties before pleadings are filed. There is an exception to the rule, where a party makes application to the court to see the ship's papers alleging that he needs to do so to enable him to swear to the particulars of his claim: the court may, in its discretion, grant such application.¹ The prize is not bailable at this stage.

The hearing is always first had upon the pleadings, the ship's papers, documents and letters captured with her, and the testimony taken *in preparatorio*.² Presumptions of enemy character exist if the ship, or goods, or both, have been taken from a belligerent, and the burden of proof, as to the main and essential fact, is on the claimants.³ And if the prize, by presumption not rebutted, or by the evidence from the papers or preparatory testimony, is proved to be enemy property, it is forthwith condemned.⁴

§ 102. "Further Proof." Should such evidence not be conclusive, however, the court may order "further proof" as additional testimony in prize is technically called. Should it be conclusive in favor of restitution, further proof should no more be allowed than when it is fully condemnatory.⁵ The following are the most general grounds for allowing the libellant to take further proof:

1. When the captured master fails to answer the interrogatories candidly.

2. Where the shipment, ostensibly on neutral account, fails to specify the consignor or consignee.

3. Where the ship has been bought in the country of the enemy.

¹ The Port Mary, 3 Rob. 233.

² Wheaton on Captures, 494; The Frances, 1 Gal. 614 and 8 Cr. 348; The Diana, 2 Gal. 93.

³ The Resolution, 2 Dal. 19; The Magnus, 1 Rob. 31; The Twee Jufrowen, 4 Rob. 242.

⁴ The Elsebe, 5 Rob. 173; The Nelly, 5 Rob. 219; The Alexander, 8 Cr. 169; The Julia, Id. 181; The Thomas Gibbons, Id. 421; The Joseph, 1 Gal. 545.

⁵ The Adriana, 1 Rob. 313; The Romeo, 6 Rob. 351; The Sarah, 3 Rob. 330.

4. Where the ship's papers are defective.
5. Where there has been suppression of important documents.
6. Where the ship's cruise was suspicious.
7. Where there is strong presumptive evidence of fraud.

Further proof may be allowed to the libellant in any one of the cases suggested; it would be refused the claimant in any such case. It may be granted to both parties, upon proper showing. New papers from another prize cause may be received, if applicable. Captors themselves may testify; so may claimants, and the employés of both. Correspondence may be offered. Affidavits taken abroad, before consuls or notaries, may be admitted when properly verified; though, of course, the better way is to take such evidence by commission; especially when the witness abroad is not in the enemy's country.

§ 103. **Preservation of Proof.** The reason why the findings of facts, in cases of naval prize, must be preserved, is that adjudications in prize are not conclusive upon nations, as heretofore remarked, though entirely so upon litigants. It is a recognized principle of international law, that any nation, feeling itself aggrieved by a judgment of a prize court, may have its wrong adjusted by appeal to the honor of the country in which the court sat, by treaty settlement of the disputed question growing out of the unsatisfactory decree, by resort to mutual arbitration, even by the extreme remedy of war.

The reason underlying this rule of international law applies with equal force to all cases against enemy property. Adjudications of captures and seizures of hostile things on land, where such judicial action is required, ought to be open to the inspection of nations as in causes of naval prize. To this end, the findings should be preserved; and, the condemnation should not immediately follow a judgment by default and *pro confesso* against all persons, but there should be other evidence of such facts as prove the *res* to be enemy property, duly taken and filed in the cause.

Whether the proceedings be against enemy property in a foreign or domestic war, the principle is the same. There would be little reason for this, in a domestic war, or a rebellion, if statutes authorizing the capture or seizure on land, and con-

demnation, of private property of enemies, were to confine proceedings to enemy property owned by insurgent citizens of the country; as, under such statutes, no occasion could possibly arise for any nation to take offense at, or exception to, the adjudication, whatever wrong it might really inflict. But the statutes of the United States, authorizing judicial condemnation of the property of enemies, seized upon land, do not distinguish between citizen-enemies' property and foreign-enemies' property. They specify certain classes of the property of enemies, declare those classes of hostile things confiscable, and direct the condemnation of "enemies' property." Under these statutes, the pleadings and all proceedings are precisely the same, whether the *res* be enemy land owned by a foreigner, or enemy land owned by an insurgent citizen, provided the owner of the *res* belongs to any of the different classes of enemies described by statute. An agent in Paris, engaged in the negotiation of confederate bonds, during the late war, could have had any property of his, found here, real or personal, seized and condemned under the confiscation sections of the Act of Congress of July 17, 1862, "To suppress insurrection, etc.," though he might never have been in this country. His vessel, for violation of the Non-Intercourse Act of July 13, 1861, might have been condemned as enemy property, though he was, in no sense, a rebel, or insurgent citizen; in no sense a traitor, having never owed allegiance, and being therefore incapable of violating the duty of allegiance. It seems perfectly manifest, that in such case, there is the same reason for preserving the testimony of the court of nations which has tried his property, as in a naval prize case.

§ 104. **Evidence in Open Court.** In ordinary cases *in rem*, (by which we mean all revenue cases against things, whether at law or in admiralty; all impersonal proceedings under the police power of the government; all actions whatever, Federal or State, for declaring judicially the *status* of a thing and directed against it,) the evidence, where opposing parties appear, is taken much in the same way as in a case *in personam*. This is true, too, of litigated confiscation cases. The testimony may be taken *de bene esse*, where such grounds for

so taking it exist as would authorize such method in a personal action. Ordinarily, witnesses are examined and cross-examined in open court; commissions are issued to take the testimony of absent witnesses when occasion requires; and general rules of evidence are found applicable. Unless made exceptionable by statute, every such case would be conducted, in the different States, in the usual way.

§ 105. **Burden of Proof.** The burden of proof, however, in cases *in rem*, is a topic which requires some elucidation. The law upon the subject is in an unsettled state. While it is everywhere conceded that the *onus probandi* is on the libellant in the first instance, there often arise nice questions, in certain stages of the litigation, whether the responsibility has been shifted from him to the claimant. Certainly he must make out his case, whether there is any opponent or not; and, in the absence of any, he may have his allegations taken as confessed. Certainly too, with an opponent in court denying his allegations, he must prove them, though presumptions may help to make the proof. Facts peculiar to the claimant or defendant, necessarily possessed by him, (such, for instance, as that he wrote or did not write a paper which he is charged with having written,) will be presumed against him, if he stand silent.

There have been cases before the Supreme Court, turning upon the question of the burden of proof, which were very nice indeed. There have sometimes been confoundings of the claimant with the defendant, when discussing the *onus* as to either of them and the libellant. While the claimant, pure and simple, must make out his case as plaintiff suing for the *res*; must establish his title or that he was in possession when the thing was seized and taken from him, (which, indeed, the record may show,) yet he need have nothing to do with the question of forfeiture unless he please. True, if knowledge of such forfeiture is peculiarly within him, from the nature of the case, his silence, in some unusual circumstances, might raise a presumption against him, just as though he had really added the character of defendant to that of claimant. Here the burden of proof is shifted to the claimant.¹ A man is not

¹ Lillienthal's Tobacco, (7 Otto,) 97 U. S. 266; Collins v. Gilbert, (4 Otto,)

always bound, however, to tell all he knows. It is a great mistake to suppose that anything may be charged to be in a forfeited state, and its owner immediately obliged to show that its *status* is opposite. Besides, a claimant may not be the owner but may have a *jus ad rem*, and may be so far from being a defendant as to desire the condemnation of the thing, that he may get his right out of the proceeds. Sometimes, however, he does not appear in the case till after condemnation of the *res*, and is then in time to assert his lien upon the proceeds.

§ 106. “Probable Cause” for Condemnation. Probable cause is a subject upon which the student is liable to be misled. He must not confound probable cause for seizure with probable cause for condemnation. Whenever the term is used, in the reports of cases, without qualification, it is well to notice whether it means such circumstances as would justify the issuance of a certificate of probable cause for the protection of the person who made the seizure, or such as make out a *prima facie* case against the thing seized. Only in the latter case is the *onus probandi* changed from the libellant to the *res*. Much misunderstanding has grown out of failure to make the proper distinction. It is sometimes said that the libellant having made out a probable case, the burden of proof is thrown on the defendant.

Now things cannot, any more than persons, be justly condemned on probabilities. There may be few or no facts proved on the part of the libellant, and he may rely wholly or almost so, upon presumptions; but they are just as good for making out a case as sworn testimony, when not rebutted: this would not be the condemning of the *res* upon probabilities, should condemnation follow.

Perhaps the Collection Act of 1799,¹ is father of much of the mischief done in the way of condemning things on suspicion and “probable cause.” It provides that “in actions, suits or informations to be brought, where any seizure shall have been

94 U. S. 753; *Crane v. Morris*, 6 Pet. 598; 1 Wharton's Ev. § 371.

¹ United States Stat. at L. Vol. I. p. 678, sec. 71.

made pursuant to this act, if the property be claimed by any person, in every such case the *onus probandi* shall lie upon such claimant." This goes very far. Whether it is constitutional or not, depends upon the construction of the latter clause quoted. It is clearly so, if it means that the *onus* is on the claimant to establish his claim; it is clearly not so, if it means that he has the burden of establishing the innocence of the *res* so soon as it shall have been seized and charged.

The constitutionality of the act has always been unquestioned, and several cases have been decided under the 71st section, and the *onus probandi* thrown upon the claimant—sometimes with very doubtful propriety.¹ In one of these,² the court used the following language: "The main exception, however, to the charge is as to the ruling of the judge, that there was probable cause of seizure, and that, therefore, the *onus probandi* to establish the innocence of the importation, and to repel the supposed forfeiture, was upon the claimants. We entirely concur in the opinion of the judge in his views of the evidence as applicable to this point." But further on, it appears that a *prima facie* case of condemnation had really been made out: so that "probable cause of seizure" did not shift the affirmative of the issue from the libellant to the claimant.³

§ 107. **Presumption—After Decree.** After the rendition of a final decree by a court having jurisdiction of the subject matter, all facts necessary to the decree will be presumed to have been found. Whether the decree be under review by writ of error or appeal, or be assailed in a collateral action, all necessary facts will be presumed to have been proven, though the record fail to show the facts expressly, provided the record shows jurisdiction of the subject matter. It was held in "The Confiscation Cases,"⁴ brought up to the Supreme Court on writs of error, that the District Court must be presumed to have found the necessary facts, as to the ownership of the *res*, and all else. Said the Supreme Court: "A further objection urged

¹ Wood v. United States, 16 Pet. 342;
Clifton v. United States, 4 How. 242.

² But see Buckley v. United States,
4 How. 251.

³ Taylor v. United States, 3 How.
211.

⁴ 20 Wall. 111, 112.

against the adjudication of forfeiture made by the District Court is, that it was made without any finding that the property belonged to John Slidell or any person included in either of the classes designated in the fifth and sixth sections of the confiscation act. This is a renewal of the complaint so earnestly pressed in *Miller v. United States*, and which we held to be without foundation. It is said that notwithstanding the default, it was the duty of the court to 'proceed to hear and determine the case according to law, as is directed by the 89th section of the act of March 2, 1799 [1 Stat. at L., 696,] respecting forfeitures incurred under that act.' But were this conceded, of what avail would it be in this case in support of the objection? The court did proceed to hear and determine the case after the default was entered. And it was not until after such hearing and consideration that the property was condemned. This appears by the record. Having heard and considered evidence, it must be presumed the court found that the property belonged to a person engaged in rebellion, or one who had given aid or comfort thereto, as well as all other facts necessary to the rendition of the judgment. This is a presumption always made in support of judgment of courts after their jurisdiction is made to appear."

Not only in these cases, and in that of *Miller v. United States* to which the court referred, but in a collateral action,¹ they have held the same doctrine. Even where the decision is incorrect, it is presumed to be correct, and all the necessary facts presumed to have been found, until set aside or reversed.² The

¹ *Tyler v. Defrees*, 11 Wall. 331.

² In *Coltman v. Beardsley*, 38 Barb. 30, 51, 52, Justice ROSECRANS says: "When the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and determine by its decision, such decision is final until reversed in a direct proceeding for that purpose. *Brittain v. Kennard*, 1 Brod. & Bing. 432; S. C., 4 Moore, 50; 12 Pick. 572, 583; *Ex parte Watkins*, 3 Peters, 202, 209; Super-

visors of *Onondaga Co. v. Briggs*, 4 Denio, 33, 34; 11 Wend. 95; Phil. Ev. ch. 1, § 5, note 292; 2 Id. Edw. ed. 15 and fol.; *Weaver v. Devendorf*, 3 Denio, 117, 120, and authorities cited; *Broom's Leg. Max.* 56 to 66; *Henerson v. Brown*, 1 Caine's, 90; *Kent and Livingston, Js.* The test of jurisdiction in such cases is whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong. 1 Q. B.

same rule holds in equity. And the presumption covers not only all matters tried, but all that might have been tried in the cause; that is, all so connected with the decree as to have affected it in any way. No evidence is admissible against such presumption.¹ The court will go no further than to look to the grounds of the sentence, even in cases before it in such a shape as to authorize such inspection; and, where no special ground is stated, but such a general one as that a ship was condemned as lawful prize, the court will presume that the necessary fact that the *res* was enemy property, must have been found.²

Rep. 66; *Rex v. Bolton*, 41 Eng. C. L. 439; *Cove v. Mountain*, 1 Mann. & Gr. 257; (39 Eng. C. L. Rep. 432.)"

¹ *Foster v. Miliner*, 50 Barb. 393-4; *United States v. Dawson*, 101 U. S. 569; *Le Quen v. Gouverneur*, 1 John. Cas. 436; *Canfield v. Monger*, 12 John. 347; *Davis v. Talcott*, 12 N. Y. 184; *Gilman v. Horseley*, 5 N. S. (Martin, La.) 664; *Aurora City v. West*, 7 Wall. 82; *Green v. Van Buskirk*, Id. 139; *Beliot v. Morgan*, Id.

619; *Comparet v. Hanna*, 34 Ind. 74, 77; *Donohue v. Prentiss*, 22 Wis. 311, 316; *Herrett v. Yandes*, 34 Ind. 102; *Succession of Tilghman*, 7 Rob. (La.) 393; *Patterson v. Bonner*, 14 La. 214; *Buchanan v. Riggs*, 2 Yeates, 233-4; *Att'y Genl. v. Norstedt*, 3 Price Ex. 97.

² *Salloucci v. Woodmas*, 3 Doug. 345 (26 Eng. Cr. L. 135); *Bolton v. Gladstone*, 5 East. 155; *Buring v. Royal*, Ex. A. Co. Id. 99.

CHAPTER XII.

THE ADJUDICATION.

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§ 108. **The Restoration.** The term “restoration” is usually applied to a judgment of acquittal of the *res*. The term “restitution” is often applied, and is of the same import. Both imply that the seized thing is judicially given back to him from whom it had been taken. The terms would not be varied, however, if the property should be awarded to some claimant who had not been the custodian at the time of the seizure. The term “acquittal” is broader, and would not only express the character of the judgment better when the award is in favor of one from whom the accused thing had not been seized, but would be antithetical with the term “condemnation.”

Restoration entitles the claimant to possession of his property, without costs or charges to be borne by him.¹ Though not entitled to damages for the detention, where there is probable cause for the seizure, he is, in all other respects, awarded his rights.

§ 109. **The Condemnation.** There are two broadly different decrees of condemnation in proceedings *in rem*:

First—When the ownership of the property is decreed to be in the government or other libellant. This is when the judgment is to enforce a *jus in re*.

Second—When the property is merely adjudged indebted and decreed to pay the debt, and made subject to sale for that purpose. This is when the judgment is to enforce a *jus ad rem*.

¹ The Rachel, 6 Cr. 329; Himely v. Rose, 5 Cr. 313; The Eliza, 2 Gal. 4.

Under the first form of decree, property real or personal is judicially declared to belong to the libellant in the full sense of ownership, so that no sale or execution is necessary to complete his title. Though the government sells what it thus acquires, it does so not to perfect the judicial proceedings, but because directory statutes usually require that there be sale; and the reason of the requirement doubtless is that Congress does not wish the government to become the general holder of property useless for its purposes. When needed, however, such condemned property may be kept, as in case of prizes adapted to government uses as Congress has provided in the prize act;¹ and this is a good illustration of the rule that such decree of condemnation needs no further act to complete it. Congress has made another exception,² which authorizes the retention of confiscated tracts of land for subdivision and leasing to refugees and freedmen, for a term of years, followed by transfer to them by private sale, should they prefer to buy. Prior to this amendment, the law required the sale of such property, though the requirement was only directory, not essential to the carrying out of the condemnation. Indeed, all the laws which require sale of forfeited property are merely directory, and none are essential to the completion of the decree fixing the ownership, or to the enforcement of any *jus in re*, or to the consummation of any proceedings *in rem* instituted and conducted for that purpose.

It has been repeatedly held that after a decree condemning property as forfeited, the ownership ceases to be in the former proprietor; that "there is nothing left in him;" that he is totally divested of all right, title or interest in or to the thing.³

The government or other libellant, having thus been judicially recognized as owner of the *res*, may sell it or not, just as any one may do what he pleases with his own, unless required to sell by some directory act; and then the sale is no more in execution or furtherance of the decree of condemnation, than would be the sale of any property otherwise acquired, with

¹ United States Rev. Stat. § 4624.

² Freedmen's Bureau Act., 13 Stat. at L. p. 507.

³ French v. Wade, 102 U. S. 132; Wallach v. Van Riswick, 92 U. S. 202, 207; Pike v. Wassell, 94 U. S. 711.

regard to which there may never have been any litigation or decree whatever. Whether the government sells any species of its own property through the agency of a commission, or of the Secretary of the Treasury, or of a court, it still sells as owner; and when forfeited property is directed by Congress to be sold by a marshal under an order of court, such sale is not technically a judicial sale to effect a decree, but is analogous to a private sale by a private owner. The condemnation is complete when the decree is signed and matured; and as the court must necessarily be in possession of the property, the only necessary order is that the marshal deliver to the libellant what has been adjudged to be his.

The second form of decree does require sale to complete its operation. It is always in favor of a creditor; and he must sell the *res* in order to get his pay out of the proceeds—the surplus belonging to the debtor. The latter, who is still the owner between decree and sale, is not the seller in any sense; the creditor is the seller of that which is not his own, but that on which he has an adjudicated lien; and, as he can only sell by forms of law and through the court, the sale is a judicial one and is governed by its rules. The subject of sale is not now under consideration, except as it serves to show the difference between the two forms of decree in proceedings *in rem*.

When the *jus ad rem* is enforced by the government, resorting to the direct action against property, the decree of condemnation in its favor places it in the condition of a creditor, like any other judgment-creditor having a recognized lien, and there must be judicial sale to make the money and complete the proceedings. The government, like a private creditor, can thus collect no more than the debt, interest and costs; and, whatever remains of the proceeds, after the satisfaction of the property's liability must be paid over to him who owned it up to the date of the sale.

§ 110. **The Decree Fixes the Status of the Thing.** In the first place, condemnation fixes the *status* of the thing. As, in a criminal prosecution against a person, the object is not to make him guilty, but to find whether he is guilty or not, so the proceeding *in rem* to enforce a *jus in re* is not to forfeit the

thing but to ascertain whether it is forfeited. So, against a lien-bearing thing, it is to ascertain the debt, and condemn the property to pay the liability. It is therefore true, of all proceedings *in rem*, that their object is to ascertain the *status* of the property proceeded against.

Judge STORY succinctly stated this proposition, when he said, "When property is seized and libelled as forfeited to the government, the sole object of the suit is to ascertain whether the seizure be rightful and the forfeiture incurred or not."¹ And the Supreme Court of Maine have stated it as clearly: "A judgment *in rem* is an adjudication upon the *status* of some particular subject-matter by a tribunal having complete authority for that purpose. Such an adjudication concludes all persons from saying the thing adjudicated upon was not such as is declared by such adjudication."²

So Mr. Justice HALL, of Vermont, defines it: "A judgment *in rem* I understand to be an adjudication pronounced upon the *status* of some particular subject-matter. * * * It is a proceeding to determine the state or condition of the thing itself; and the judgment is a solemn declaration upon the *status* of the thing, and it *ipso facto* renders it what it declares it to be."³

Chief Justice MARSHALL expressed the opinion of the United States Supreme Court, as follows: "It appears to be settled in this country that the sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself and operates as a complete change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of co-ordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law, can never arise, for no co-ordinate tribunal is capable of making the inquiry. The decision in the case of *Hudson & Smith v. Guestier*, reported in 6 Cranch, is considered as fully establishing this principle."⁴

¹ *Gelston v. Hoyt*, 3 Wheat. 318.

⁴ *Williams v. Armroyd*, 7 Cr. 423,

² *Lord v. Chadbourne*, 42 Me. 444. 432.

³ *Woodruff v. Taylor*, 20 Vt. 65.

And it might have been added that the principle had been established ever since the *actio in rem* first received its form, place and symmetry. The principle holds in prize cases.¹ And in municipal forfeitures for breaches of statutes.² And in proceedings against things indebted whether in admiralty or at law.³ Even though a stranger should claim and the right owner should not,⁴ the latter would be divested in case of condemnation. Estoppels *in rem*⁵ form an exception to the general rule that estoppels are only binding on parties and privies, because the law acts directly on the thing itself, and renders it that which the judgment declares it to be; though it would be better to say that there is really no exception since all are necessarily parties to proceeding *in rem*, and the change of *status* which takes place upon sentence, is therefore conclusive upon all.⁶

§ 111. **Conclusiveness of the Decree.** This fixing of the *status* of the thing, is conclusive upon all persons; in other words, the condemnation is *res adjudicata quoad omnes*.

The whole system of procedure against things under the fiction of law that they are guilty, hostile or indebted, depends upon the truth of this proposition. Seizure would be an outrage, notice would be a work of supererogation, the whole trial would be an idle ceremony, were it not true that the judgment, either of condemnation or restoration, is binding upon all the world. The system would not answer the necessity which called it into existence, if, after general notice, vessels and cargoes condemned for infringement of revenue laws;—merchandise and debts and lands forfeited under rigid exercise of

¹ *Rose v. Himely*, 4 Cr. 291; *Cronson v. Leonard*, Id.* 434; *Bradstreet v. The Neptune Ins. Co.*, 3 Sum. 600; *Penhallow v. Doane*, 3 Dallas, 54.

² *Hudson v. Guestier*, 4. Cr. 295; *Certain Logs of Mahogany*, 2 Sum. 600; *Magee v. Beirne*, 3 Wright, 50.

³ *Inrie v. Castrique*, 8 C. B. N. S. 1, 405; *The Globe*, 2 Blatchford, (C. C. Rep.) 427; *Thompson v. St. Bt.*

Morton, 2 Ohio State, 36; *The Robert Fulton*, 1 Paine, 620.

⁴ *Scott v. Sherman*, 2 Wm. Black. 982.

⁵ *Smith's Leading Cases*, Vol. 2, pp. 827-8.

⁶ *Woodruff v. Taylor*, 20 Vt. 65; *Lord v. Chadbourne*, 42 Me. 429; *Cammell v. Sewell*, 3 Hurl. and N. 617; *The Railroad v. Hemphill*, 35 Miss. 17.

the *jus gentium*;—anything condemned under municipal statutes, State or Federal, were not legally presumed to be condemned contradictorily with all men, so that the judgment is binding upon all. Indeed, the continuation of this legal method would not be desirable, if the universality of the judgment in its operation and effect were destroyed, crippled in any way, or rendered uncertain.

The timidity which has been exhibited concerning this branch of the law; the want, in many instances, of a clear understanding of proceedings *in rem* as a system; the occasional erroneous reasoning found in the reports, have, perhaps, caused the subject to be somewhat underrated.

The finality of the decree *in rem* is the basis of the system. If, after the court seized of jurisdiction has exhausted its power by final decree, and the appellate court has also exhausted its jurisdiction, and the judgment has been affirmed by the tribunal of last resort, any citizen or any court can disturb the decree, the whole structure falls to the ground. The decree is final or nothing. Not only all the proceedings that went before, but all those that follow after, depend upon the finality. The sale of the *res* could not be effected, if the fixing of the changed *status* by decree were susceptible of subsequent attack, for there would be no buyers. The title to the condemned property would never be clear, so long as the fountain whence it flows should remain unsettled. Courts of nations, which cannot force citizens of different countries to implead each other in personal actions, would be cut off from all the benefits and convenience of the action *in rem*, if its decree should be found not, in the highest sense, *res adjudicata*.

The authorities concur in the doctrine of the conclusiveness of the decree, against all, though it is frequently expressed in the books in a rather roundabout way. Vice Chancellor Sandford puts it clearly:¹ "The general principles applicable to this subject," the conclusiveness of the decree, "are well settled and established in countries where the common law prevails. Where the matter in controversy is land or other immovable

¹ *Monroe v. Douglass*, 4 San If. Ch. Rep. 126, 179.

property, a judgment pronounced in the *forum rei sitæ*, is held to be of universal obligation as to all matters of right and title which it professes to decide in relation thereto, and absolutely conclusive. And in whatever place the proceeds of the same property may afterwards be found, such judgment, acting *in rem*, will be held equally conclusive by whomsoever the title may be questioned, and whether it be directly or incidentally brought into controversy. Story's Conflict of Laws, secs. 591 to 593, and 549 note; 3 Burge's Commentaries on Colonial and Foreign Law, 1015, 1062-3-6."

Prof. Greenleaf, writing of foreign judgments, says that where they are *in rem*, and land or other immovable is the *res*, and they are pronounced in the *forum rei sitæ*, they are of universal obligation as to all matters of right and title which such a judgment professes to decide in relation thereto.¹ And he had said previously, in his work on evidence, when speaking of judgments *in rem*, with respect to other species of property, both in the exchequer and admiralty, that they are "binding and conclusive, not only upon the parties actually litigating in the cause, but upon all others; partly upon the ground that, in most cases of this kind, and especially in questions upon property seized and proceeded against, every one who can possibly be affected by the decision has a right to appear and assert his own rights by becoming an actual party to the proceedings; and partly upon the more general ground of public policy and convenience: it being essential to the peace of society that questions of this kind should not be left doubtful, etc."² And Judge STORY says that the judgment *in rem* is conclusive upon the facts upon which it professes to proceed; that this doctrine, though formerly subject to doubt, is now "fully established" in the courts both of England and the United States.³ "It is sufficient," said he, "on this subject, to refer to the cases of *Croudson v. Leonard*, 4 Cr. 434; *Rose v. Himely*, Id. 241, and *Hudson v. Guestier*, Id. 281. It does not strike me that any sound distinction can be made between a sentence pronounced

¹ 1 Greenleaf Ev., § 541.

² Id., § 525. See note.

³ *Bradstreet v. Neptune Ins. Co.*,

3 Sum. 600.

in rem by a court of admiralty and prize, and a like sentence pronounced by a municipal court upon a seizure or other proceeding *in rem*. In each case, the sentence is conclusive as to the title and property, and it seems to me that it must be equally conclusive as to the facts on which the sentence professes to be founded. This, I think, is settled doctrine in England and in the courts of the United States. It is a just result from the whole reasoning in *Rose v. Himely*, *The Mary*, (9 Cr. 126, 142 to 146,) and *Gelston v. Hoyt*, 3 Wheat. 246.”

One or two English cases will be enough to notice here. The Exchequer Chamber held that a judgment *in rem* in France was a bar to a suit against a ship: whereupon, the defeated litigant brought his suit before the Queen’s Bench which also held the decree *in rem* in France to be conclusive.¹ WELLS, J., said,² “If those proceedings were *in rem*, and the court, by a judgment upon proceedings of that character, determined that the ship was charged with a ‘privilege’ or lien for the advances, and liable to be sold to defray them, then, unless it appeared upon the face of the proceedings that the judgment was void, it could not be questioned even by persons who, like this plaintiff, were not before the court.”

And in *Cummell v. Sewell*,³ it was said by the court that the judgment *in rem* “is similar to the condemnation of goods in the exchequer and the sentence of a prize court, both of which are *conclusive as to the ownership* of the goods or ship.” In other words, Baron MARTIN, who delivered the court’s opinion, expressed their view that condemnation is *res adjudicata*, binding upon all persons.

In a suit against a sheriff for damages for levying an attachment, the Supreme Court of Pennsylvania discussed an English case as follows: “The only case to which the counsel of the plaintiff in error have been able to point, as sustaining the special plea, is that of *Scott v. Sherman*, 2 Wm. Blackstone’s R. 977. That was an action of trespass, against custom house officers, for entering the plaintiff’s house and carrying away

¹ *Castrique v. Behrens*, 98 Eng. C. L. 403.

³ *Cummell v. Sewell*, 3 Hurl. & Nor. 617, 646.

² *Castrique v. Imrie*, Id. 34.

some wines called Geneva, which had been removed that morning from the plaintiff's ship to his dwelling, and which constituted part of the ship's stores. The defendants gave in evidence a record of condemnation of the Geneva in the Court of Exchequer at a prior term. The Court of King's Bench held the plaintiff could not recover, because, the property of the goods being changed and irrevocably vested in the Crown by the judgment of condemnation, it followed, said Judge BLACKSTONE, as a necessary consequence, that neither trespass nor trover can be maintained for taking them in an orderly manner. For the condemnation has a retrospect and relation backwards to the time of the seizure. It was added, also, that as he knew of their seizure, and had notice of the condemnation by two proclamations according to the course of the court, it was the plaintiff's duty to have put in his claim, and neglecting this, 'he shall be forever barred by the condemnation, not only with respect to the goods themselves, *but every other collateral remedy for taking them.*'

"I know of but one answer to the authority of this case—that is, that the seizure and condemnation of the goods under the revenue laws was strictly a proceeding *in rem*, and therefore concluded all the world, both as to title and collateral action; but for that reason it is not applicable to a proceeding by foreign attachment under our statutes, which, I repeat, is not strictly a proceeding *in rem*. If counsel could have sustained their main proposition that Hopkins' attachment was a proceeding *in rem*, that authority would have been in point."¹

§ 112. **Collateral Attacks Inadmissible.** And even when the record shows error or irregularity, the decree *in rem* cannot be collaterally attacked.²

In *Gelston v. Hoyt*,³ the court said: "This is a seizure for a forfeiture under the laws of the United States, and conse-

¹ *Magee v. Bierne*, 39 Penn. 63-4

² *Grignon's Lessees v. Ast* 1, 2 How. 319, 340; *Thompson v. Tolmie*, 2 Pet. 157, 163; *Voorhies v. Bank of United States*, 10 Pet. 449; *Florentine v. Barton*, 2 Wall. 210, 216; *Harvy v. Tyler*, Id. 328, 341, 345; *Comstock v.*

Crawford, 3 Wall. 396, 403, 406; *Woodruff v. Taylor*, 20 Vt. 65; *Knœfel v. Williams*, 30 Ind. 7; *Magee v. Bierne*, 39 Pa. 63, 64; *State v. Central R. R.*, 10 Nev. 47.

³ *Wheat*. 312 *et seq.* See *Williams v. Amroyd*, 7 Cr. 432.

quently the right to decide upon the same, by the very terms of the statute, exclusively belongs to the proper courts of the United States, and it depends upon its final decree, proceeding *in rem*, whether the seizure is to be rightful or tortious. If a sentence of condemnation be pronounced, it is conclusive that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture. And in either case the question cannot be litigated in another forum. This was the doctrine asserted by this court in the case of *Slocomb v. Mayberry*, 2 Wheat. R. 1, after very deliberate consideration, and to that doctrine we unanimously adhere.

“The reasonableness of this doctrine results from the very nature of proceedings *in rem*. All persons having an interest in the subject matter, whether as seizing officers, or informers, or claimants, are parties, or may be parties to such suits, as far as their interest extends. The decree of the court acts upon the thing in controversy, and settles the title of the property itself, the right of seizure, and the question of forfeiture.

“If its decree were not binding upon all the world upon the points which it professes to decide, the consequences would be most mischievous to the public. In case of condemnation, no good title to the property could be conveyed and no justification of the seizure could be asserted under its protection. In case of acquittal, a new seizure might be made by any other persons *toties quoties* for the same offense, and the claimant be loaded with ruinous costs and expenses. This reasoning applies to the decree of a court having competent jurisdiction of the cause, although it may not be exclusive. But it applies with greater force to a court of exclusive jurisdiction; since an attempt to re-examine its decree, or deny its conclusiveness, is a manifest violation of its exclusive authority. It is doing that indirectly, which the law itself prohibits to be done directly. It is, in effect, impeaching collaterally a sentence which the law has declared to be valid until vacated or reversed on appeal by a superior tribunal.”

The Supreme Court of Louisiana have held the same doctrine: “It is well settled that the presumption which attaches to the thing adjudicated is *juris et de jure*, and that no evi-

dence is admissible against it.”¹ “With regard to presumptions *juris et de jure* they establish so completely the facts presumed that no proof to the contrary can be admitted.”²

“By the monition every one who could have asserted a right to or in the property libeled was a party to the suit, and the judgment, consequently, is a complete bar to all rights which could have been exercised there.” [In the United States Court.]

“The settled principles of law give to the judgment *in rem* the authority of the thing judged against all parties to it, that is, against all the world who had a claim to assert on the property. These principles must govern this case, be the consequences what they may.”³

And Louisiana does not differ from all the other states in this doctrine.

“This court cannot enter into the inquiry,” was said in *Buchanan v. Briggs*,⁴ “whether the six casks of whisky were legally seized or not. It appears by the judgment of a proper tribunal, having full and competent jurisdiction of the matter in question, that the whisky was condemned as forfeited. That sentence is conclusive against the present plaintiff, and cannot be unravelled or revised in any State court, on principles of established law and sound policy. The plaintiff might have contested the seizure in the District Court of Virginia by filing his claim there, and, having failed to do so, he is precluded from trying the question in this collateral way. This is no new case: 2 Blackst. Rep. 977; Hard. 194; T. Raym. 336; Carth. 323, 327; 12 Vin. Abr. 95. Authorities may be found in the books wherein this doctrine is pointedly asserted.”

And the condemnation *in rem* was held conclusive, in England, against the crown;⁵ and it would be good against the government of the United States, if it should, in any case, fail to claim, and the *res* be sentenced at the suit of some other party. “Every existing claim which a party has failed to make

¹ *Orr v. Thomas*, 3 Ann. (La.) 582.

² *Succession of Tilghman*, 7 Rob. (La.) 393; *Patterson v. Bonner*, 14 La. 214.

³ *Syndics v. Nicholson*, 4 L.R. 85, 86.

⁴ *Buchanan v. Briggs*, 2 Yates, 233, 234.

⁵ *Attorney General v. Norstedt*, 3 Price's Ex. R. 97.

in a proceeding *in rem*, before a final decree, is to be considered as waived, and cannot be brought forward on any subsequent proceeding.”¹

The Supreme Court said: “These proceedings do not come before us on a writ of error, to correct any irregularities or mere errors of law in the court which rendered the judgment, but they came before us collaterally as the foundation of defendant’s title.

“According to the well-settled doctrine in such cases, no error can be regarded here, or could have been rendered in the court below on the trial, that does not go to the extent of showing a want of jurisdiction in the court which rendered the judgment condemning the property. (See *Cooper v. Reynolds*, 10 Wallace, and the numerous cases there cited.)”²

“The general rule unquestionably is, that the former adjudication is a bar, not only as to all matters actually tried, but as to all matters which might have been tried under the issues formed by the pleadings also. (*Le Quen v. Gouverneur*, 1 John. Cas. 436; *Canfield v. Mouger*, 12 John. 347; *Davis v. Talcott*, 12 N. Y. Rep. 184.) Many other cases might be cited, but the general rule is too well established to need the citation of numerous decisions in its support.”³

In *Aurora City v. West*, the court said: “Where every objection urged in the second suit was open to the party within

The Santa Maria, 10 Wheat. 431; Magee v. Bierne, 39 Penn. 63, 64; White v. Weatherbee, 126 Mass. 450; Butler v. Suffolk Glass Co., Id. 512; Caylus v. N. Y. & Kingston R. R. Co., 76 N. Y. 609; Dunham v. Bowen, 77 N. Y. 76; Steinbank v. Relief Fire Ins. Co., Id. 498; *Re* Brooklyn, Winfield etc. R. R. Co., 19 Hun. (N. Y.) 314; Robinson v. Marks, Id. 325; *Re* Roberts, 59 How. (N. Y.) Pr. 136; Jex v. Jacob, 7 Abb. (N. Y.) N. Cas. 452; Cooper v. Platt, 45 N. Y. Sup. Ct. 242; Schrauth v. Dry Dock Sa. Bk., 8 Daly, (N. Y.) 106; Gordinier’s Appeal, 89 Pa. State, 528; Dunham v. Wilfong, 69 Mo. 355; Tutt v. Price,

7 Mo. App. 194; State Bank v. Rude, 23 Kan. 143; Turner v. Allen, 66 Ind. 252; Rosenmueller v. Lampe, 89 Ill. 212; Lyons v. Cooledge, 89 Ill. 529; Decatur Gas Light Co. v. Howell, 92 Ill. 19; Graceland Cemetery Co. v. People, 92 Ill. 619; Noyes v. Kern, 94 Ill. 521; Trescott v. Barnes, 51 Iowa, 409; Mally v. Mally, 52 Id. 654; Thompson v. Myrick, 24 Minn. 4; Nougé v. Clapp, 101 U. S. 551.

² Tyler v. Defrees, 11 Wall. 331.

³ Foster v. Milliner, 50 Barb. 393, 394; Aurora City v. West, 7 Wallace, 82; Green v. Van Buskirk, Id. 139; Beliot v. Morgan, Id. 619; Comparet v. Hanna, 34 Indiana, 74, 77, 78;

the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed *in rem judicatam*, and the former judgment in such a case is conclusive between the parties.”¹

And in *Beliot v. Morgan*: “All the objections taken in this case might have been taken in that.”

“Under such circumstances, a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between same parties touching the same subject matter, though the *res* itself be different. The plea of *res judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time.

“A party can no more split up defenses than indivisible demands, and present them by piece-meal in successive suits growing out of the same transaction.”²

Donohu v. Prentiss, 22 Wis. 311, 316,
317; Herrett v. Yandes, 34 Indiana,
102.

¹ 7 Wall. 82, 102.

² 7 Wall. 619, 621, 623.

CHAPTER XIII.

RETROACTION.

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§ 113. **Decree Relates to the Earliest Date of Liability to Condemnation.** Condemnation always retroacts to the time when the property first became responsible, unless otherwise ordered by statute. It relates to the time of the offense committed by the use of the thing condemned; or to the time when the enemy character of the thing was acquired; or to the time when a lien upon it was created, as the case may be. No one has ever doubted that the condemnation of mortgaged property to pay its obligation, thus retroacts.

From the date of forfeiture, either by offense or hostility, the property ceases to belong to the proprietor who previously owned it, and its title is vested at once in the government to which it is forfeited. It may be that the latter will never seize and condemn what has been forfeited; that it will never have its right judicially vindicated by the declaration of the forfeiture in a decree; but, if the date we have indicated is not the precise time of the forfeiting, what other date can possibly be assigned? The decree not only declares judicially that there is forfeiture, but it declares by implication, if not by expression, that the forfeiture preceded the judgment. What point of time, anterior to the decree, can have been the moment of the forfeiting, but that in which some offense was committed in, with, or by the thing, or that in which it became enemy prop-

erty? From that date, the right of property had changed hands.

A consequence of the foregoing proposition is that all intermediate transfers of the forfeited thing, (from the forfeiting to the condemnation,) are void as to the party which became vested of the proprietary right by reason of the forfeiture. Good they may be, as to all other persons; good forever, if they should never be attacked by the beneficiary of the forfeiting. Things forfeited to the United States Government, because some law has been contravened by them so as to incur the forfeiture denounced by such law, may never be proceeded against, and the wrong-doing-owner may sell them; but the right to seize, to cause to be condemned, is in the government; and sale, even before seizure, even to an innocent purchaser without notice of the *status* of the things, would be null and void as to the United States.

The government may therefore seize, in the hands of an innocent person who had honestly acquired, without notice, property previously forfeited to it; and may proceed to have the forfeiture judicially declared. It may seize and proceed to condemnation, at any time, till such action shall be barred by prescription.

May government seize and condemn for forfeitures incurred prior to the passage of the act authorizing such proceedings, under which it proceeds?

Clearly not, if the offense of the thing is *malum prohibitum*, and is created by such act. Again, clearly not, though the offense committed by the use of the thing be *malum in sé*, if forfeiture, as the result of such offense, is first made so by the act authorizing the proceedings. And the negative answer is the affirmation of a mere truism, since no forfeiture could be incurred when there was no law creating forfeiture.

But, clearly, the government may seize and condemn for forfeitures incurred prior to the passage of the act authorizing such proceedings, under which it proceeds, if forfeiture had been thus incurred under previously existing law. For instance, under the law of nations, all enemy property is forfeited and may be confiscated. A statute authorizing the confiscation,

would be merely a directory law; and condemnation under such statute would retroact to the time the property became hostile though that might ante-date the enactment of the act authorizing the procedure.

§ 114. **Relation at Common Law.** It is true that, until seizure and "office found," the late owner still retains the property forfeited, for the reason that it is by no means certain that any forfeiture will ever be judicially declared. It is true, where lands are forfeited at common law, in England, for some offense,—the crown does not have the legal possession and title vested so as to be able to dispose of it at will, until the judicial declaration of the forfeiture; and then the law of relation carries back the title, as it were, to the date when the late owner forfeited it by his act. He is entitled to the rents and profits before the condemnation, because he is in possession, and the rights of the government, though existing, have not been ascertained. The government could not, in this time of uncertainty, dispose of the property by sale, but it is not true that "an office is necessary to complete the title:" it is necessary to ascertain the title. And the possessor could, during this interval, convey to an innocent purchaser without notice, no seizin that would not be defeasible upon the subsequent judicial declaration of the *status* of the forfeited thing.

It has been contended that, in cases of deodand and suicide, forfeiture does not vest property until the fact is found; but these cases are good illustrations of the general doctrine. The offender ceases to own, and the crown begins to own, at the very instant of the forfeiture: that fact is found when sentence is pronounced. The doctrine that sentence does not forfeit, but ascertains not only what has been forfeited but when the forfeiting was done by the offender, and when the title from the forfeiting passed to the government, was long ago settled.¹

§ 115. **Rulings on the Law of Relation.** In the United States, it has been held that where a statute declared that for-

¹ Jones v. Ashhurst, Skinn. 357; Rex v. Wendman, Cro. Jac. 82; Att'y Lockyear v. Offley, 1 T. R. 252; Genl. v. Freeman, Hard. 101; Hales Robert v. Wetherall, 1 Salk. 223; v. Petit, Plowd. 260. Wilkins v. Despard, 5 T. R. 112;

feiture should take place upon the commission of a stated offense, the offender could not sell the forfeited thing to an innocent, unnotified purchaser, so as to defeat the title vested in the government, at the time of the transfer by forfeiture;¹ but Judge STORY stoutly tried to maintain the opposite doctrine, seeming to lose sight of the fact that courts never forfeit anything by their decrees and sentences.

The general doctrine was laid down more broadly, though with some qualification, in *Henderson's Distilled Spirits*;² yet, three of the judges dissented, and complained of the general rule as "the severe construction in favor of forfeitures in the hands of innocent parties," saying that "it will scarcely be possible for any one to purchase merchandise with safety, when it may be seized *and forfeited* in his possession for reasons such as are assigned in this case."

Where, by statute, the government has choice of remedies; has the option to sue *in personam* for a fine, or proceed *in rem* to have forfeiture judicially ascertained, it has been held, (but without good reason) that in case the latter remedy be selected, there is no retroaction upon sentence back to the date of the offense.³ If not, *quere*: when did the forfeiting occur? And if there should be election on the part of the government whether to prosecute personally for murder or manslaughter, would the date of either crime depend upon the election? Or would it with regard to such election between offenses *mala prohibita*? If the election would not affect the facts in cases of personal offenses, what reason is there in holding so where the fictitious offenses of things are involved?

§ 116. **Transfer to an Innocent Purchaser, Without Notice, Before Seizure.** Though the propositions with which this chapter was begun are in accord with the decision of the Supreme Court in the case of the *Bags of Coffee, The Brigantine Mars*, and the subsequent decision cited, yet the extended dissenting opinion of Judge STORY, in the Coffee Case, has made such an impression upon the legal mind, that the right principle always

¹ United States v. 1960 Bags of Coffee, 8 Cr. 398; The Brigantine Mars, Id. 417.

² 14 Wall. 44.

³ United States v. Grundy, 3 Cr. 351

seems to be only grudgingly admitted. It may, therefore, be necessary to devote a few paragraphs to that dissenting opinion in which he contended that a purchaser in good faith, without notice of the offense and before seizure, would acquire a good title even against the government.

To the authorities which he cites with regard to forfeitures as penalties for crimes decreed in personal actions, it is sufficient to say that they are not in point. The case of *The United States v. 1960 Bags of Coffee* was *in rem*, while convictions for treason, etc., must be *in personam*. But even in this class of cases, it is illogical to say with regard to convicted traitors, (to whose property the law of retroaction is applicable by English law, though the cases are not *in rem*,) that because the offender has, until conviction, "full power and authority to alien his lands and to convey to the purchaser a complete and legal though *defeasible* seizin; and, unless such conviction follow the offense, the alienation is good against all the world," therefore the rights of property did not pass from the offender at the precise date of the offense. The fact admitted, that the seizin *was defeasible*, exposes the fallacy of the argument. Why was the seizin defeasible in the hands of the purchaser? Because his title was not good against the crown, since sentence retroacts to the offense, and avoids all transfers affecting the crown's right.

After showing from Blackstone, Bracton and others, the English rule, as to chattels forfeited by way of penalty, in personal actions, Judge STORY inquires, "can the case be distinguished where the forfeiture is made to attach to the instrument itself, by means whereof the offense is committed?" In other words, where the proceeding is *in rem* against a guilty thing? "It seems to me," says he, "that the most favorable cases for the United States, namely, deodands and waifs, conclusively show that no such distinction anciently prevailed; for, whatever may be the effect of relation, it is certain that no property vested in the crown until seizure or inquisition." But his preceding paragraph shows that he means by "vested," the possession as well as title; for he admits that the offender cannot convey a good title *as against the crown*: from which it must be inferred that

the right of property and possession changes at the date of the offense; for to say that government could have possession before the seizure and while the property is still in the hands of the offender or his vendee, would be idle. "I infer, therefore," he concludes, "that no absolute property vested in the United States in the case at bar, until actual seizure was made, and the decision in the king's bench in *Lockyer v. Offley*, 1 T. R. 252, seems to me fully to support the inference." Let us see whether it does. The ship *Hope* had been seized for barratry in smuggling spirits from Hamburgh to London, but this seizure was not before the King's Bench, except as used in argument; for the case there was a suit upon an insurance policy; and the decision goes no further than that if a ship is always liable to be declared forfeited, after such an offense having been committed by her "it does not follow" "that the insurer, at any distance of time is answerable for loss under a limited undertaking."¹

The case cited by the Attorney General, from 5 Term R., as stated by BULLER, J., was: "To an action of trespass for taking the plaintiffs' ship and goods, the defendants have pleaded that the ship, etc., was *seized as forfeited*. * * * The plaintiffs, however, contend that the legality of the seizure may come in question on this record: but when it is admitted by the pleadings, as a fact, that the ship was seized as forfeited under the Navigation Act, the court cannot say, as a point of law, that she was not seized for that purpose, and that the defendant is a trespasser, merely because it appears that the defendant did not proceed to condemnation." And Lord KENYON, C. J., said, "I cannot distinguish this case in principle from that cited in Salk. and Mod. [*Robert v. Whitehead*, 12 Mod. 92; Salk. 223.] The action of *detinue* proceeds on the ground of property: it was there determined that *detinue* would lie, although there had been no sentence of condemnation; and from that it follows as a necessary consequence, that the property is vested in the defendant, or is at least devested out of the plaintiffs." And there was judgment for the defendant.²

¹ *Lockyer v. Offley*, 1 Term Rep. 252, 261.

² *Wilkins v. Despard*, 5 Term R. 112, 118.

Although this was cited by the government against the Bags of Coffee; and although it is far from showing that an offender may convey title to a forfeited thing as against the government, yet Judge STORY argues that it confirms his own view.

In answer to the question, "What is the operation of the acts done by the sovereign to vindicate his title by forfeiture?" the learned jurist cites from personal prosecutions, and commentators on crimes and offenses, instead of producing civil causes where things are defendants, as always in the *actio in rem*: yet, even in such personal prosecutions, he admits that in case of treason or felony, the forfeiture of lands relates back to the time of the offense committed, so as to avoid all intermediate changes and consequences; in case of suicide, the *felo de se* forfeits all his goods and chattels from the time of committing the act which occasions the death, etc., but that the forfeiture of goods and chattels, for treason, only relates to the conviction, etc.: all of which shows nothing more than that the English law has made different provisions in different cases: none of which shows that the title of the Bags of Coffee did not pass at the time they committed an offense forfeiting themselves to the United States. Besides, the forfeiting of the chattels, in the case of the traitor, was merely a penalty upon conviction.

The majority of the court having held views adverse to Judge STORY's, and the case of the Mars being a reiteration of the true doctrine, it is needless to dwell longer on the dissenting opinion.

§ 117. **The Doctrine of Retroaction Settled.** The case of Henderson's Spirits, (supported by several decisions between it and the Coffee Case,) puts the doctrine in qualified and cautiously considered terms: "Where the forfeiture is made absolute by statute, the decree of condemnation, when entered, relates back to the time of the commission of the wrongful acts, and *takes date* from the wrongful acts, and not from the date of the sentence or decree."¹ And in a later case, the doctrine is not only reaf-

¹ Henderson's Distilled Spirits, 14 Wall. 44, citing Roberts v. Witherhead, 12 Modern, 92; Id., 1 Salkeld, 223; United States v. Bags of Coffee,

8 Cr. 398; The Mars, Id. 417; Gelston v. Hoyt, 3 Wheat. 311; Caldwell v. United States, 8 How. 381; United States v. Grundy, 3 Cr. 338; Wood v.

firmed but more broadly stated in terms fully according with the views herein presented.¹ There are some unimportant, but comparatively recent decisions not fully in harmony, of which one against some barrels of whisky² is a sample. It was therein held that condemnation does not retroact unless "the intention of Congress that the forfeiture should be absolute and instantaneous" upon the committal of the offense, is expressed in the statute. This view, overlooking the established rule of relation; and the fear that commerce may suffer by the enforcement of the rule, as expressed in the dissenting opinion in Henderson's Case, are probably somewhat attributable to the influence of Judge STORY's argument above discussed, though that learned jurist subsequently to the date of that argument, repeatedly assented to the true application of the law of retroaction.

The importance which Judge STORY attached to the want of notice on the part of the innocent purchaser, has been greatly overrated. He conceded that if the purchaser of the offending thing is aware of the offense, the law of relation would date the forfeiting back to the offense, and would avoid the intermediate transfer. And he also admitted that in case of guilty knowledge on the part of the purchaser, the transfer would be good with respect to all persons, except the government. And it would be good, as above shown, towards all and forever, should the government never proceed to have the forfeiture judicially ascertained and declared. It is evident, therefore, that under the settled doctrine of the Supreme Court, notice of the offense is of no legal importance whatever. It has nothing to do with the moral guilt of the purchaser who has knowledge of the forfeiting offense. His legal position is precisely that of the innocent purchaser. He has title good against the vendor; good against all persons, except the government; and good against the government should it fail to vindicate its right till its action shall have been prescribed by lapse of time.

United States, 16 Pet. 342; Clifton v. United States, 4 How. 248; Fontaine v. Ins. Co., 11 Johnson, 293; Kennedy v. Strong, 14 Id. 128.

¹ Thatcher's Distilled Spirits, 103

U. S. 679.

² United States v. 100 Barrels of Whisky, 2 Abb. U. S. Rep. 93. See, also, United States v. 56 Barrels of Whisky, 1 Id. 93.

The argument of the dissenting judge in the Coffee Case, and of those in the case of the Distilled Spirits, that commerce would be injuriously affected by the doctrine of retroaction in case of sales to innocent purchasers after the forfeiting by offense, might be good if addressed to Congress with the view of shortening the time of prescription, but it seems inapplicable to the exposition of the law as it is.

§ 118. **The Rule Not Confined to Offending Things.** The date of the forfeiting is fixed by the same rule, when things hostile are concerned. It is the precise time when the thing becomes hostile that the right of property changes from the former owner to the government.

The date must be, in all cases, the precise time when the hostility first has existence, since there can be no other point of time at which the forfeiting can possibly occur: the decree of condemnation being nothing more than the judicial declaration that such forfeiting has transpired.

All the property of a national enemy becomes hostile *en masse*, upon the declaration of war, or the legal commencement of hostilities. This hostility *en masse* permeates all the individual and private property of each enemy person; and the right to have every piece of it afterwards confiscated because thus forfeited, is instantaneous with its assumption of the enemy *status*.¹ The legislative department must direct the confiscation of all such forfeited property as it may choose to take, except that in cases of naval prizes, such direction is

Rose v. Himley, 4 Cr. 272; The Santissima Trinidad, 7 Wheat. 306; Brown v. United States, 8 Cr. 121; The Andromeda, 2 Wall. 481; The Venus, Id. 258; The Sallie Magee, 3 Wall. 451; The Hampton, 5 Wall. 375; The Amy Warwick, The Crenshaw, The Hiawatha, and The Brilliance, 2 Black, 636; McCulloch v. State of Maryland, 4 Wheat. 413; The Ouchita Cotton, 6 Wall. 521; The Cotton Plant, 10 Wall. 577; Union Ins. Co. v. United States, 6 Wall. 765; United States v.

Hart, Id. 772; Morris' Cotton, 8 Wall. 507; Slidell's Land, 20 Wall. 92; Conrad's Lots, Id. 117; Miller v. United States, 11 Wall. 292; Semmes v. United States, 1 Otto, 21; Osborne v. United States, Id. 474; Grotius' De Jure Gentium, Lib. III. c. vi.; Id. c. ii. § 2; Vattel's Droit des Gens, Liv. II. c. vii. §§ 81, 82; Bynkershoek, Lib. I. c. vii.; Puffendorf, Lib. I. 8, c. vi; Martens' Law of Nations, Lib. VIII. c. iii. § 9.

unnecessary, since the taking of such forfeited property is understood among nations to need no special directory law.

To illustrate with a naval prize: Does the capturing government's right to it date only from the confiscation? No; for confiscation is by the court, and it merely judicially condemns upon a state of facts previously existing. Does the right date only from the capture? No; for the capture itself rests for its validity upon a pre-existing right to capture. That right is found in the enemy character of the thing; and that right must have existed from the date of the beginning of such *status*. A ship nominally neutral becomes hostile from the moment that it perpetrates a hostile act, and the right of the nation, against which the act is done, to take that ship, arises immediately.

With regard to enemy property other than naval prizes, the *right* vests in the government to which it is hostile, anterior to any directory act authorizing its seizure and confiscation. A nation may have the complete right, yet never choose to enforce it, as has been the case with regard to real estate, in most of the modern wars. In the civil war in this country, our government chose to limit itself to the confiscation of but a small part of the enemy property, real and personal, which had been forfeited to it by hostility. All the property of the enemy, and of each individual enemy, had been so forfeited, but only that of certain civil and military officers, agents, etc., who refused to return to allegiance, was directed to be proceeded against.

When condemnation took place against the enemy property, ordered by Congress to be proceeded against, the decree necessarily retroacted to the date when such property had first become hostile, so as to avoid all intermediate transfers—precisely as in case of the condemnation of a naval prize, or of things guilty, or in case of a decree against a forfeited pledge or pawn. It did not merely retroact to the date of the passage of the directory law authorizing procedure under the law of nations, for such law could not possibly make that confiscable which was not so before; it retroacted, by the law of relation, to the exact point of time when the *res* first became the sub-

ject of enemy ownership, and the thing remained thus confiscable, whether any statute authorizing proceedings against it should ever be passed or not. And it must continue thus confiscable, in any war, to the date of peace—the right by reason of the forfeiting being all the time perfect, and so vested in the government that no intermediate transfers could divest the right, whether made by the enemy owner to a person with notice of the hostility and consequent forfeiture of right of property, or to a person without such notice.

Such transfer, being in derogation of the government's vested right, would be not a transfer as to the government; therefore, proceedings could be had against the property of the enemy officer owned by him at any time from the beginning of the war.

Manifestly, it is not essential to the completion of such vested right that the government should have the *seizin* of the property, any more than in case of such right to things guilty, before seizure. *Seizin* is necessary, however, before the government can convey property, in either case; or, in case of indebted things forfeited, the beneficiary of the forfeiture must have the *seizin* before he can sell the property itself to another. Seizure and condemnation effectuate the right, so as to make the thing actually change hands, as the forfeiting had previously made the right change hands; and then the *res* may be sold, and title to it may be given which shall cut off all previous sale of the offender, or the enemy, (as the case may be,) whether to an innocent or to a collusive buyer.

The universality of the application of the law of relation to the date of the forfeiting, (always beyond the date of the seizure, the finding, and the condemnation,) is so grounded in reason, that the system of proceeding *in rem* would be wanting in symmetry and logical character, were it not the rule of law. If the right were only coeval with the decree which declares it, the previous seizure must be without cause, the information false, and the confiscation must originate or create the *jus in re*, which would be absurd. And the law of relation being universal to all classes of things, the consequence that all transfers after the date of the change of right are null and void, as to the government, (unless the forfeiture has been purged) is equally broad.

§ 119. **Purging Property of Forfeiture.** If a thing which has incurred forfeiture by being used in contravention of law, or by acquiring the enemy character by reason of the hostile *status* of its owner or controller, can be purged of forfeiture by sale prior to seizure, would not this always be done? How easy it would be for such property to change hands! How readily could the offender find an innocent purchaser without notice! It would not be so practicable for an enemy to do so, since knowledge of the hostile character of all his property must be presumed, after declaration of war. And, since notice does not affect the question at all, how easy it would be for one enemy to sell lands or other property to a fellow enemy, if retroaction went back no further than the date of the seizure, or of the statute authorization to seize! Especially convenient would such a loose rule of law have proved during the civil war in this country, when the statute authorization was limited to the enemy property of designated classes of persons. Both contracting parties being within the enemy's lines, both enemies, and the real estate also within those lines, there could be delivery as well as sale, there could be proper recording of title, and the whole transaction might be in accordance with the *lex rei sitæ*. Could there be produced any better example of the utter futility of proceedings *in rem* to condemn such property, in the absence of the rule of retroaction?

Again: suppose the official enemy should transfer his land situated within the hostile lines to another official enemy; it would still be enemy property of the class confiscable under the statute-authorization mentioned; but, if proceedings thereunder are limited to the interest held, at the time of seizure, by the owner named in the libel, (as has been erroneously supposed,) such transfer would defeat the confiscation proceedings, in the absence of the rule of retroaction to the time when the hostility of the property began.

Of course, even in the absence of the rule, land situated within our own lines could not be sold, transferred and delivered, and title recorded, by contracting enemies within the hostile lines, because they could not cross the lines to make delivery, nor correspond with an agent for the purpose, nor send the

title to be recorded, nor could the officer within the lines enter the transfer of record. All intercourse and correspondence between enemies is inhibited by public law.¹

An exception to the rule that forfeiture cannot be purged by sale prior to the arrest of the property, may be found in the transfer of a ship by an enemy to a neutral followed by a voyage made by the ship in the pursuit of legitimate commerce; and this exception is in the interest of commerce, and is further based upon the impracticability of capture from the neutral without an act of war towards his sovereign. Though the purchase by a neutral nation, under such circumstances, might be a breach of comity with respect to the opposite belligerent, the transaction, unless under aggravated circumstances, would have the effect of practically purging the forfeiture.

§ 120. **Condemnation of Property to Pay Debt Relates to the Maturity of the Obligation.** The law of retroaction is precisely the same when applied to the third class of things primarily responsible. A judgment *in rem* to enforce a lien establishes the *status* of the thing as lien-bearing property from the date the debt matured, and allows interest from that day. No one would contend that the judgment created the debt, though that would be quite as plausible as to say that any judgment can create a forfeiture. Just as reasonably might it be said that property subject to an exigible mortgage lien is not an indebted thing till found so to be by a court, as that property tainted with such offense or hostility as incurs forfeiture, is not really a forfeited thing before its *status* as such has been judicially pronounced.

It will be universally conceded that when anything, in vindication of a *jus ad rem*, is judicially found and declared to be

¹ MacLachlan on Ship., 2 ed. 518; Wheaton Int. Law, 547; Potts v. Bell, 8 Term R. 561; The Rapid, 8 Cr. 155; The Julia, Id. 193; Jecker v. Montgomery, 18 How. 113; The Bagaley, 5 Wall. 405; United States v. Huckabee, 16 Wall. 434; Griswold v. Waddington, 16 Johns. 479; Dean v. Nelson, 10 Wall. 172; Lasere v.

Rochereau, 17 Id. 439; Woods v. Wildet, 43 N. Y. 168; United States v. Grossmayer, 9 Wall. 75; White v. Burnley, 20 How. 249; The Hoop, 1 Rob. 196; Exposito v. Bowden, 7 Ell. & Bl. 779; 1 Chitty on C. & M., 379; 1 Duer on Ins., 419; 3 Phill. Int. Law, 108.

indebted in a given sum, the decree relates to the time when, by operation of law upon contract, by effect of *quasi* contract, by the legal result of tort, or by any means which may give rise to indebtedness, property responsibility became perfected; and it is respectfully submitted that the law of retroaction applies in the same way to property subject to the enforcement of the *jus in re*. It has already been shown that this is true with regard to the first two classes of property subject to proceedings *in rem*: and the occasions are comparatively few where indebted things are subject to the major right; but a contract of pledge, conditioned that the property pledged and delivered to the creditor should be wholly forfeited upon failure of the debtors to meet a pecuniary obligation, or to perform a required act, stipulated in the contract, would be subject to the general rule, if judicial action should be invoked.

CHAPTER XIV.

SALE AND WARRANTY.

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§ 121. **The Judgment-Creditor's Sale of Property Relatively Condemned.** Property condemned-to-pay must necessarily be sold in order to carry the condemnation into effect. The libellant asserting a right in a thing, becomes simply a judgment-creditor with privilege upon the thing judicially ascertained; and he must obtain a writ of sale and sell the thing-debtor in order to make his money. All successful libellants who proceed upon a *jus ad rem* thus become judgment-creditors who must sell to effectuate their judgments.

A very large portion of proceedings *in rem* are for the vindication of this minor right, in all of which sale is essential to their completion. Actions against ships and steamboats for repairs and supplies; upon bottomry and respondentia bonds; for wages of sailors and steamboat roust-a-bouts, pilots and wharfingers; for towage and various services; for salvage, collision, and all actionable marine torts; upon contracts of affreightment and charter-party; to enforce liens, in penal sums, under the revenue and navigation laws; against the property upon

attachment, of a concealed, absconding or non-resident debtor; against a decedent's estate for debt; to enforce mortgage liens directly against the mortgaged property, and, generally, all actions to enforce liens against property, necessitate the selling of that which is condemned by proceedings *in rem*.

The necessity to sell is upon the government, when it thus becomes a judgment-creditor, just as it is upon a private citizen in that capacity. There is a large class of government cases, in which the seizure and subsequent proceedings are to enforce the collection of sums due, in all of which the selling of the condemned property is obviously necessary to effectuate the decrees.

§ 122. **The Judgment-Owner's Sale of Property Absolutely Condemned.** Property forfeited, being absolutely condemned and changed in its ownership, does not need sale to effectuate the decree of condemnation. The new owner, the successful libellant, must sell in his capacity of owner, if he sell at all.

In the great majority of absolute condemnations, the government is the libellant; and, as it is not the public policy to accumulate property not needed for governmental purposes, Congress has directed that all property acquired by condemnation, (with a few exceptions where it is needed for public purposes,) shall be sold; and, as the government-libellant, as judgment-owner, is an artificial person, and must employ some agency to effect the sale, Congress has directed that the sale shall be made by a marshal under an order of court.

It will be seen that though all condemnations are followed by sale, with the exceptions mentioned, yet the two classes of sales are as different as possible; as wide apart as a private sale by an owner and an execution sale by a sheriff. More clearly this will be seen when the incidents of such sales are discussed, especially with reference to warranty.

The sale of property absolutely condemned to the United States is merely in obedience to directory statutes. Lands thus condemned might be relegated to the land commissioner for sale, should Congress choose to do so, without affecting the proceedings *in rem* at all, since they are complete upon the judicial fixing of the *status* of the lands. But, because of such

directory statutes, whatever is absolutely condemned must be sold by the courts.

§ 123. **What is Condemned is Sold.** What is sold is that which has been condemned; judicially described or referred to with certainty, in the order of sale; and publicly offered to the world in the advertisement made by the legally authorized officer who is to make the sale. If less is to be sold than has been condemned, the writ of sale and the advertisement must show this. In revenue sales of personal property, the court must sell all that has been adjudged forfeited; and the court must order the sale of the entire *res* whenever so directed by statute, and where it is the known policy of the government to have sales made. When land is the *res* that has been seized and brought into court and condemned, and made the property of the United States, the sale is not to effectuate the decree, but is altogether analogous to a sale by any citizen through an auctioneer in open market, in the method of the sale, which is fixed by directory statutes. An illustration of such direction may be given from a statute of 1862,¹ which provides that property real and personal, condemned under that act, should be so "condemned as enemies' property and become the property of the United States, and be disposed of as the court should decree, and the proceeds thereof paid into the treasury;" and "that the several courts shall have power to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshals thereof where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of this act, and vest in the purchasers of such property, good and valid titles thereto."

By this statute, whatever is condemned must be sold. It is clearly the duty of the court, under the statutes, to order the sale of whatever has, by its decree, become the property of the United States. Should a judge, however, order the sale of less, the marshal could not sell the whole. If the writ of sale merely covered a lease of condemned land, or interest for a term of years, or a life-interest in such land, only so much could

¹ 12 U. S. Stat. at Large, p. 591.

be advertised, offered and sold, under such order, and a further sale would become necessary. The purchaser in market overt is protected by the advertisement, the writ, and the decree, by which he may know what is sold. If, however, he look only to the advertisement and is deceived by it, he would not be bound by the marshal's adjudication to him of that which is less than was offered for sale. He is always protected when the libellant sells as owner.

That Congress might have authorized the permanent retention of land by the government, there can be no doubt. Forfeited land might be devoted to public use; made the site of new forts, custom-houses, post-offices or other public structures; might be simply held by the government for all time.

The discretion is not in the court, however, to order the sale at auction or not. The court must issue the writ of sale without unnecessary delay, for the sale at auction, of all that has been condemned. If a life-estate has been condemned, the judge must direct the sale of such interest; the marshal must advertise and sell such interest, and no more. This is true of revenue cases, all admiralty cases indeed; and true of all cases of forfeiture *in rem*, as well as the particular species mentioned in the immediately preceding paragraphs.

The sale, by the government, of property of which it has acquired the ownership by condemnation, is governed altogether by the principles appertaining to private sales; for, as above remarked, the only reason why it is made through the court is that the government is an artificial person, and therefore must necessarily sell, if it sell at all, through some agency; and the act mentioned requires the court to make the order, and the marshal to sell for the government.

The title, in government sales, is given by the marshal to the purchaser, as authorized by statute, subject to such judicial order as to the form as the law may require the court to prescribe. There should be a compliance with State statutes as to the number of witnesses and other essentials, varied in different Federal districts according to the *lex rei sitæ* when real estate is concerned.

The marshal must make return of the sale to the court, and

of the cancellation of all recorded mortgages and liens with the proper certificate in proof thereof, showing a perfect compliance, in all respects, with the writ of sale.

§ 124. **Judgment of Distribution and Confirmation of Sale.** The confirmation or homologation of the sale may be made directly by order of court, or indirectly by the subsequent proceedings. The indirect confirmation will appear by the judgment of distribution and by the receipt of the purchase money by the government.

The judgment of distribution acts upon the price received at the sale. The court fixes the costs of the suit, fees of proctors (when not fixed by law, and recognizes the fees judicially when so fixed;) and necessary expenses attending the taking and keeping and sale of the *res*. The court now hears any contest between co-captors, if the case be one of prize; claims of informants, when the law allows them a portion of the proceeds, provided they have not been co-libellants, as they may be in cases under certain statutes; awards to collectors of customs and surveyors and naval officers of ports their share in cases upon revenue siezures, where the law imposes such duty upon the court and not upon the collector himself or the secretary of the treasury; and where there are intervenors asserting liens upon the proceeds, their applications may, at this stage, be heard contradictorily with the libellant or other opponent. The net proceeds are then ordered to be paid into the treasury of the United States, when the condemnation has been absolute and in their favor.

Such judicial action upon the price received from the sale, and the act of receiving the money into the treasury, are ratifications of the sale on the part of the government. They are both such ratifications as conclude the United States, and operate as an estoppel of complaint against slight errors which do not amount to legal fraud against the government, though they would not, and, in the nature of the case, could not supply judicial want of jurisdiction over the subject matter of the suit. They put the government in the attitude of a private individual receiving money for a consideration, but they do not

necessarily cure all vital defects of the procedure, either as to the government or as to other parties.

§ 125. **Sale by Judgment-Owner is not in Execution, and is not What is Technically Called a Judicial Sale.** The sale is not in execution. It is not necessarily resultant from the judgment of condemnation. Such judgment does not need to be executed. Property is completely transferred to the United States when guilty or hostile property is condemned, and no execution can possibly follow. The transaction is complete. Property is completely transferred to a private libellant when it is absolutely condemned to him. He may keep the thing: he is not bound to sell in order to complete or "execute" the judgment. The government, in the first supposed case; and the private libellant, in the second, occupy precisely the same ground.

The sale, following a condemnation of property to the government, is not in execution, but is independently made, without reference to the judgment, in obedience to statutes requiring such sale where the government does not need to retain the property. Would any one contend that judgment, in favor of a private libellant, declaring the forfeiture of a thing, must necessarily be followed by execution? Would any suppose that there must necessarily be any sale at all? And, can the government's position, in case things become its own property by forfeiture and condemnation, be different in any respect, except that the United States do not choose to be a general property holder?¹

The writ of *fieri facias*, or any similar writ of execution, would not fit such a case. Government sells condemned property under the writ of *venditioni exponas*. It is not a writ in execution of any judgment. The vendor, under such writ, is not the court, (as in judicial sales,) but is the United States; as clearly so, as if the sale were made through the agency of the Secretary of the Treasury, (as some of the revenue provisions authorize,) instead of the agency of a court through a marshal.

¹ The retaining of condemned prize ships by the Government, for the use of the navy, in certain cases, is authorized by the Prize Act.

Sales of this kind must be distinguished from execution sales; and also from judicial sales to enforce liens in furtherance of judgments *in rem*; to satisfy mortgages, to pay debts pursuant to probate decrees, and the like. In the former, it is the owner who sells; in the latter, it is the court which sells for the creditor, without regard to the owner's consent, and usually against his will and remonstrance.

In judicial sales of the latter class, there is no more reason why there should be warranty than in execution sales. Because judicial sales are ordered by the court, to carry out its judgment, should they be deemed different from those ordered by the plaintiff in execution, by general authority of law, to carry out the judgment for money, rendered in his favor? It would be absurd to hold that either a court or a plaintiff in execution, is responsible for the sort of title which the purchaser gets. How is the plaintiff in execution to know that the land he executes to get his debt paid, is under a valid title? It is certainly very safe to say that in judicial sales, such as just mentioned, as in execution sales, there is no warranty. The numerous authorities showing that in judicial sales of this sort, made by the courts to effectuate judgments, there is no guaranty of title, will not be disputed. Such sales may be set aside for fraud, legal or moral; and it cannot be denied that though there is, under the common law, no guaranty of the quality of merchandise and other chattels thus sold, the existence of the article sold is assured. And the purchaser of land may get back the price, when he gets no title, before the debtor-owner can recover possession.¹ It is not designed here to enter upon the criticism of the cases in the reports which are frequently cited to prove that all judicial sales are without warranty; and that, in all,

¹ In judicial sales of property to pay debts of the owner, or to discharge incumbrances upon land, the purchaser may get back the price if he fail to obtain a valid title, before the owner or his heir can recover the land by reason of such invalidity of title. *Sands v. Lynham*, 27 Gratt. 334; *McLaughlin's Adm'r v. Daniel*,

8 Dana, 182; *Vallé's Heirs v. Flemming's Heirs*, 29 Mo. 152; *Shroyer v. Nickell*, 55 Mo. 269; *Evans v. Snyder*, 64 Mo. 516; *Hudgens v. Hudgens*, 6 Gratt. 320; *Howard v. North*, 5 Tex. 315; *Mocklee v. Gardner*, 2 Har. & G. 176; *Grant v. Lloyd*, 12 S. & Marsh, 191; *Petty v. Clark*, 5 Pet. 481.

caveat emptor applies. Many of those cases seem to have been decided upon the assumption that the mere method of sale is indicative of its character. No discrimination is made between sales by owners through the courts to get the price, and sales by creditors through the courts to get debt paid out of another owner's property, while the latter neither provokes the sale nor consents to it. The sale by the United States of property acquired by forfeiture is an example of the former: the sales by judgment-creditors after liens have been adjudged, in proceedings *in rem*; and by an administrator when he acts in the capacity of representative of creditors and provokes an order against the estate he administers to sell property to pay their debts, may be instanced as examples of the latter. But the courts seem often to have failed to draw any distinction between an administrator's sale to obtain the price for the heir's use, when there are no debts; sales ordered by court to effect partition of property, etc., on the one hand, and sales for creditors' benefit on the other. Not the character of the sale, but the method of it, seems to have influenced their decisions with reference to judicial sales in the application of the doctrine of warranty and of the maxim, *caveat emptor*.

To show that the character, not the method, should be the criterion, this reflection should suffice: Had Congress, in the statutes directing the sale of property acquired by forfeiture, directed the marshal to sell without judicial order, the sale would not have differed from one by a private owner through an auctioneer. No conceivable difference exists between the two, as to method. This narrows the matter to the order of sale as now required. It cannot be that the important matter of warranty depends upon the method and not upon the character of the vendition; it cannot be that the selection of the necessary agency, by an artificial person, determines whether or not the person guarantees the title. Suppose there were statute authorization for a private citizen, in a suit to recover land, to obtain, after judgment decreeing the land to be his, a writ of *venditioni exponas*, and to sell through the courts? Would it be said under the decisions, that this is a judicial sale, that

there is no warranty in judicial sales, and that *caveat emptor* applies?

The government does now sell some forfeited things through the Secretary of the Treasury: does that change the character of the sale?

§ 126. **Obligations of the Government, when Vendor.** The government, possessing both the title and the *seizin* of the condemned thing, sells to the purchaser precisely as a citizen vendor sells. The United States are not warrantors when they sell property under execution, but they are when they sell their own things. Governments are bound to act in good faith as well as private individuals. Corporations must be held to have souls and consciences, so far as concerns moral rectitude in business transactions. Whether wronged natural persons have remedies against governmental corporations or not, the latter are as much bound, in law and good morals, to deal justly, as though such remedies existed. Indeed, they are the more bound so to do—rather, the moral obligation to do so is the more apparent, when we reflect that the neglect of this duty on their part would work greater hardship than in cases of contracts between private persons where the law gives complete remedy for wrongs.

If a government is bound to act in good faith in sales to the subject of a sister government which might resort to extreme measures in righting the legal wrongs of that subject, and be justified in so doing by international law, is it not clear that in sales to its own citizens it is just as clearly bound, in good morals, to sell in good faith?

It seems indisputable that when a government goes into the market to sell, it is morally bound by all the obligations legally imposed upon a private vendor under similar circumstances; that it is legally bound, in all cases where the law gives the wronged vendee a legal remedy directly against the government, to be asserted in the Court of Claims, or other court given jurisdiction by statute; and also, in all cases where the government as plaintiff, seeks to enforce alleged rights growing out of a contract of sale to its own citizens.

Congress acted upon the propositions here advanced, when it

established the Court of Claims and gave it jurisdiction in suits against the United States upon contracts expressed or implied. That court has said: "It is the settled rule of this court, and *the principle upon which it was established*, to administer the same law, between the government and a claimant, which is administered between ordinary suiters."¹ That court has held that the United States is bound by the unauthorized contracts made, and obligations assumed by an agent, if they afterwards have ratified such acts, just as a private person would be bound under like circumstances.² Where the Secretary of the Treasury held money for the United States, and the latter were sued for it, and where they defended, that court said: "It does not lie in the mouths of the defendants in this suit to say that their secretary's act was illegal, and that they are not responsible for unlawful acts, because their secretary acted in their name and strictly on their behalf, and they have retained the money."³ "Where a statute expressly defines the power of an officer, it is notice to all the world; but where a statute confides a discretion to an officer, a party dealing with him in good faith may assume that the discretion is properly exercised,"⁴ and the United States would be bound by such officer's acts.

Without quoting extracts from decisions of the Supreme Court, it may suffice to say that they have held the United States subject to legal obligations, such as the Court of Claims have repeatedly expressed.⁵ Not only in this country, but in England, the sovereign is held bound when he has ratified the acts of his officers, just as any principal would be with regard to the obligations contracted by his agent. After stating the rule as between private persons, Baron PARKE said: "Such being the law between private individuals, the question is, whether the act of the sovereign ratifying the act of one of its officers, can be distinguished. On that subject, I have con-

¹ Reeside v. United States, 2 Court of C. R. 29.

² Fremont v. United States, 2 Court Claims R. 476.

³ Brown v. United States, 6 Court Claims R. 171, 197, 199.

⁴ McKee v. United States, 12 Court

Claims R. 527, 528; Thompson v. United States, 9 Id. 187, 196.

⁵ United States v. Speed, 8 Wall. 72, 83; Lee v. Munroe, 7 Cr. 366, 368; Boyce Ex's v. Grundy, 3 Pet. 210, 218; Petty v. Clark, 5 Pet. 481; Green v. Biddle, 8 Wheat. 1.

ferred with my learned brethren, and they are decidedly of opinion that the ratification of the crown, communicated as it has been in the present case, is equivalent to a prior command.”¹ This decision was referred to in another case,² where it was said by the court: “If there had been any doubt upon the original intention of the government, it has clearly ratified the acts of its agent, which, according to the principles of the decision in *Buron v. Denman*, is equivalent to a previous authority.”

And the doctrine is held by the elementary writers;³ and implied warranty by the government asserted,⁴ in case of prize confiscation, and by parity of reasoning, in case of other condemnations of enemy property.

Courts represent the government when ordering the cancellation of liens to clear the new title, after condemnation *in rem*, and in making distribution of proceeds, and confirming the sales made by the marshal, when acting under statute authority.⁵ And the purchaser has the right to rely upon the acts of the marshal as ratified by the court, and to consider them the acts of the government.⁶ “For where a statute expressly defines the power of an officer, it is notice to all the world.”⁷

The rule between private contractors with regard to agency is too well settled to admit of argument. “Where a principal ratifies a sale made by the agent, by receiving its fruits, he is thereby bound by the agent’s representations.”⁸ And he is estopped from denying the original authority of his agent, if he has ratified the act of the latter by accepting, receiving, or holding the proceeds or benefits of the agent’s act;⁹ for the

¹ *Buron v. Denman*, 2 Excheq. R. 188.

² *Secretary of State of India v. Sahaba*, 13 Moore’s P. C. 6.

³ *Story’s Agency*, sec. 307a.

⁴ 2 Kent Com., 632, *note*.

⁵ *Cole v. Johnson*, 53 Miss. 95; *Gaines v. Kennedy*, Id. 104, 109.

⁶ *Boyce’s Ex’rs v. Grundy*, 3 Pet. 210, 218; *Young v. Harris*, 2 Ala. 108; *Mead v. Burin*, 32 N. Y. 275; *Parham v. Rando*, 4 How. (Miss.)

435, 451; *Brown v. Rice’s Adm’r*, 26 Gratt. 474.

⁷ *McKee v. United States*, 12 Ct. of Cl. R. 527, 528; *Thompson’s Case*, 9 Id. 187; *United States v. Speed*, 8 Wall. 72, 83.

⁸ *Wharton on Agency*, § 174; *Doggett v. Emerson*, 3 Story, 700; *Oaks v. Turquand*, L. R. 2 H. L. 325; *Kibbe v. Hamilton Ins. Co.*, 11 Gray, 163.

⁹ *Bolton v. Hillersden*, 1 Lord Raym. 224; *Byrne v. Doughty*, 13

taking of the proceeds is adoption of the sale.¹ And a partial adoption is an adoption *in toto*.² The principal cannot, at the same time, both approbate and reprobate the contract; cannot take the benefit which it confers and repudiate the obligation which it imposes.³ He must adopt the whole of the agent's contract or none.⁴

§ 127. **The Government or Other Vendor Bound to Refund Money Wrongly Received.** Where the United States have received money but given no consideration therefor, they are bound to refund it, as a private person would be required to do under such circumstances.⁵ And what would be required of a private vendor who should sell what he does not own? The answer is by the Supreme Court: "A vendor is bound to know that he actually has that which he professes to sell."⁶ For it is legally a fraud, though it may be in fact a mere mistake, for one to sell what is not his own, and he must indemnify the wronged vendee, not only by restoring the price, but by paying such damages as the legal fraud may have occasioned.⁷ In *Hart v. Swayne*, (just cited,) freehold was sold when the vendor had only copy-hold; and it was held a legal fraud though the sale were made *bona fide*, and the vendor was ordered to restore the purchase money to the vendee, with interest and all the vendee's expenses; and the sale was set aside. In the next cited case of *Bowling v. Pollock*, the seller had supposed himself to have the legal title, but the court said, "This turns out to be entirely untrue. The thing supposed to be bought and

Geo. 46; Thorald v. Smith, 11 Mod. 72; Johnson v. Smith, 21 Conn. 627.

¹ Brewer v. Sparrow, 7 B. & C. 310; Byrne v. Morris, 4 Tyr. 485.

² Farmers' Loan & Trust Co. v. Walunth, 1 Comstock, 433; Story on Agency, § 250; Bell v. Shibley, 33 Barb. 610; N. Y. & New Haven R. R. Co. v. Schuyler, 34 N. Y. 30; N. Y. & New Haven R. R. Co. v. Schuyler, 38 Barb. 534; New Eng. Ins. Co. v. De Wolf, 8 Pick. 56; Culver v. Ashley, 19 Pick. 300.

³ Bristowe v. Whitmore, 9 House

of Lords, C. 391.

⁴ Udell v. Atherton, 7 H. & Nor. 172.

⁵ United States v. State Bank, and The Merchants' Bank v. United States, 6 Otto, 96 U. S., pp. 30, 36.

⁶ Allen v. Hammond, 11 Pet. 72.

⁷ Hart v. Swayne, L. R. 7 Chan. Div. 42; Jones v. Clifford, L. R. 3 Chan. Div. 779; Schofield v. Templer, Johns. Eng. Chan. 166; Smith v. Robertson, 23 Ala. 312; Flynn v. Campbell, 6 Mon. 286; Bowling v. Pollock, 7 Mon. 32.

sold was not there, nor any part of it. This was a clear mistake, and no fraud" [*id est*, no moral fraud,] "is imputed to the parties. What, then, ought to be the effect of that mistake? The principle that the chancellor will vacate contracts on the ground of mistake is too familiar to need either proof or illustration."

If a trustee sell property under a judicial decree, representing the title to be good, and it afterwards is found bad, the court will annul the decree, even after the confirmation of the sale, and will order the return of the price to the vendee.¹ Money paid under a void execution may be recovered.² So the price will be restored to the vendee who has purchased under a mortgage foreclosure in a State court, if he is afterwards dispossessed of the property by a decree of a United States Court, in bankruptcy, and a second sale made, free of mortgage, under such decree.³ And always, where there has been want of jurisdiction to make the sale, the vendee is entitled to have the price which he has paid, returned to him.⁴

Chancellor KENT ordered that a mortgage be satisfied out of the proceeds of sale, (after the sale had been under a statement of the selling officer that the property was free from mortgage,) that the purchaser might have the property in accordance with his contract of purchase.⁵

It is well settled that, though there be no warranty in the conveyance, the money paid for a title or thing which had no existence at the time of contract, can be recovered back, for the reason that the "vendor undertakes that he is the owner of that which he assumes to sell," and "is regarded in every sale as coming under an implied undertaking to his vendee, that he has a right to make sale of the thing which he attempts to transfer to him."⁶

§ 128. Warranty of Owner's Sales, However Made. It is

¹ Preston v. Frye, 38 Md. R. 222.

² Schwinger v. Hickock, 53 N. Y. 280.

³ Davis et al. v. Railroad, 1 Woods' C. C. R. 661.

⁴ Morgan v. Hammett, 23 Wis. 41; Bell v. Craig, 52 Ala. 215, 217; Blano

v. Bowie, 53 Ala. 153, 162; Newdigate v. Davy, 1 Ld. Raymond, 742.

⁵ Lawrence v. Cornell, 4 Johns. Ch. 542.

⁶ Gardiner v. Mayor, etc., 26 Barb. 423; Martin v. McCormick, 4 Selden, 331; Hitchcock v. Giddings, 4 Price,

frequently said that there is no warranty in judicial sales. It is said that though the government, when it goes into the market to sell like a private individual, must stand in his shoes and take all the obligations of a vendor; yet, that in judicial sales, neither a private nor a sovereign vendor is bound to warrant the title offered for sale.

Now there are different kinds of judicial sales. Whether there is warranty of title or not, depends upon the terms of the decree and sale. The test is: In what capacity does the Government sell? If there is a money judgment, and execution is issued against the land of the defendant, in execution, the plaintiff certainly does not warrant the defendant's title to the purchaser; the latter pays what he thinks it worth; he takes the chances; he must look out for himself: so in judicial sales when the price does not go to the owner; when the sale is without his consent. But does the same rule apply when the plaintiff has, by decree of condemnation, become the *owner* of the land, and then offers it for sale under order of court, be that plaintiff a citizen or the government itself? It is exceedingly absurd to say so. The reasons do not apply. There is warranty here on the part of the seller at such judicial sale.

In all judicial sales of prize; in all judicial sales of goods captured in war; in all judicial sales by the government of all property whatsoever, condemned *in rem* to the government, there is implied warranty of title. What was said of the government's warranty of the title of captured property, by the Court of Claims,¹ and generally stated by Chancellor KENT,² will apply to all judicial sales springing from decrees *in rem* which sweep off all old liens and create a title new, complete and paramount, and vest it in the government as owner.

The numerous decisions adduced in this chapter, showing the government's obligation, (like that of a private vendor,) to make good the thing sold or give up the money unjustly held,

135; *Thompson v. Gould*, 20 Pick. 141; *Allen v. Hammond*, 11 Pet. 63; *Southall v. Rigg*, 11 Com. Bench R. 481; *Forman v. Wright*, 11 Com.

Bench R. 492-3; *Eichholz v. Bannister*, 17 Com. Bench, N. S. 721.

¹ *Port v. United States*, 19 Law Rep. 12.

² 2 Kent's Com. 632, note.

would be meaningless if there is no warranty in judicial sales of condemned property. The moral duties which are shown to rest upon governments, would be nugatory if there is not an implied contract in every such sale, to maintain the purchaser in his title or restore the sum received from him when he performed his part of the expressed contract. Government just as certainly warrants the title to be good as the purchaser warrants his money to be genuine. There is an implied contract that the latter will replace, with good money, any part of the price which may have been paid with bad money—and the implication must be mutual.

§ 129. **Warranty under the Civil Law.** The rule of the civil law, that nothing less than express exemption from warranty would save the seller from the obligation, was, in Rome, subject to the further provision that even express exemption from warranty of title against the seller's own act should be void, because it encouraged fraud.¹ Where there were no such legal restraints based upon public policy, the contracting parties might limit or enlarge warranty by their conventions, but it was implied in every case where there was no express stipulation; and, unless warranty was restrained by covenant, the seller was bound to answer both for the price and for damages, in case of eviction.² *Evicta re, non ad pretium dumtaxat recipiendum, sed ad id quod interest competit; ergo et si minor (minoris pretii) esse cepit, damnum emptoris est.*³ And the sum to be paid by the seller was not the price merely, but the value of the thing at the time of eviction.⁴

If one sold the property of another, he subjected himself to the action *ex empto*, in case of the purchaser's ejectment.⁵ This action would lie in all cases of defective title, or of the non-delivery of the thing sold.⁶ And it would lie before actual ejectment—(indeed, before any suit had been brought by the real owner to evict the purchaser,) upon discovery that the title was not good.⁷

¹ Dig., 2. 14. 7. 7.

² Dig., 19. 1. 11. 18.

³ Dig., 21. 2. 70.

⁴ Dig., 19. 1. 45; 21. 2. 66. 3.

⁵ Dig., 18. 1. 28.

⁶ Id.

⁷ Dig., 19. 1. 30. 1.

The application of the law of warranty was alike to real and personal property,¹ and the *actio ex empto* applicable in relation to a sale of either. It was resorted to in case a seller sold a thing, movable or immovable, to which he had no title and could convey none. The deceived purchaser might recover the money paid as price, under this form of action.²

Agreeably to the civil law maxim, "A sound price warrants a sound commodity," (as expressed by Domat,) the *actio redhibitoria* compelled the seller to pay back the price when the quality of an article sold proved worse than it had been represented; and where the deception had been gross, double the price might be recovered; and this suit was styled *actio in duplum*.

By the Edilitian law, the seller was liable, not only for the faults which he concealed, but even for those of which he was ignorant;³ and what were *causa hujus edicta est, ut occurratur*, etc., termed *Edilitian stipulations*, were the warranties of good title and sound commodity.

The principles of the civil law govern in Louisiana, and are largely embodied in the civil code, which is always to be interpreted as a system. There is no common law in that State;⁴ and, as there is none of the United States,⁵ Federal Courts, sitting in Louisiana, must find the civil law to be the *lex rei sitæ* by which contracts are to be expounded.

By the laws of Louisiana, there is an implied warranty in all sales, judicial and conventional, without any stipulation to that effect in the deed. There must be express release from the obligation to warrant the thing sold, if the vendor would escape the responsibility. The law imposes and attaches warranty as a legal consequence of the contract of a sale.⁶ It exists in all contracts of sale, in that State, unless there is an

¹ Cod., 8. 45. 6.

² Dig., 18. 1. 25. 1; Dig., 18. 1. 4. 5; Dig., 18. 1. 62. 1.

³ Dig., 21. 1. 1. 2.

⁴ *Agnes v. Judice*, 3 Martin, (La.) 186; *Abat v. Whitman*, 7 New Series, (La.) 164; *Succession of Franklin*, 7 Ann. (La.) 395.

⁵ *Wheaton et al. v. Peters et al.*, 8 Pet. 658.

⁶ *Scott v. Featherston*, 5 La. Ann. 314; *Dufief v. Boykin*, 9 Id. 297; *Gautreaux v. Boote*, 10 Id. 137, 139; *Huss v. Neville*, 3 La. Ann. 327; *Clark v. O'Neal*, 13 Id. 381; *Scott v. Featherston*, 5 La. Ann. 314; The

express stipulation of *non-warranty*.¹ This holds good in judicial sales evidenced by sheriff's deeds.²

§ 130. **Obligations of the Vendee; "Caveat Emptor."** The government sells as owner when guilty or enemy property has been condemned to it, and is sold by it. It sells as creditor when property indebted to it is condemned to pay in vindication of a lien. It is only in the latter case that the maxim, *caveat emptor*, applies. The government, like any other libellant proceeding to collect a privileged debt of a thing, is not presumed to know anything about the validity of the title vested in the debtor; and it would often be better for a creditor to lose his claim than to warrant such unknown title. Whether the sale, in such case, be judicial or executory, the vendor does not sell as owner. Certainly the court does not sell as owner, where the sale, in such case, is judicial; nor does the marshal, where the sale is executory. There is no one who can be reasonably required to warrant the title. The purchaser takes the risk. Let him beware. He risks little, where the notice by monition is general, since all claimants, owners, lien-holders, etc., must necessarily be satisfied out of the proceeds of the property, so far as the price will go, unless they have been defaulted and thus forever debarred, or have failed to make out their case and to get judgment.

But, in the former case, when, in vindication of a *jus in re*, the United States or any other libellant has had title vested by a decree of condemnation, and then offers it for sale, the maxim is *caveat venditor*, and the contrary apothegm has no application.

The case is not altered, where intervenors have responded to the monition and appeared for the purpose of having their liens satisfied out of the proceeds. In such case, the *res* may be a hostile or guilty thing as to the libellant, but an indebted thing as to the intervenors. Here the government libellant becomes the owner of the *res*, but must sell it that the liens may be satisfied; yet the sale is by the owner, and the maxim *caveat*

Civil Code of La. Arts, 1846, 2501, 2505, (Voorhies' Ed.)

² Scott v. Featherston, 5 La. Ann. 314.

¹ Huss v. Neville, 3 La. Ann. 327.

vendor applies—not *caveat emptor*. The purchaser takes title from the libellant—not from the intervenors. The sale is by an owner—not by a creditor. Of course, in such case, if the whole *res* be exhausted to pay the intervenors, and yet prove insufficient, the libellant would not be further bound. The incumbrances are cleared away, at all events, and the purchaser gets the new title absolutely perfect.

§ 131. **Rights of Vendee.** *Caveat emptor*; but of what let the purchaser beware when buying, of the government owner, a title springing from a decree *in rem* which is *res adjudicata quoad omnes*? The maxim here is of but limited significance. Let the purchaser have wariness enough to see that the court had jurisdiction of the subject matter, and over the rights of all persons so as to be able to hear and determine with regard to them; that is, let him see that there was lawful seizure and universal notice, and then he need not look beyond the decree.¹

If there is any jurisdictional defect, or any fatal flaw in the sale or title given, he might be unable to hold the property, though he would not lose his right to recover what he had paid without receiving in return a *quid pro quo*. Where the sale is regular, under a proper writ, after legal advertisement; and the deed lawfully executed, in due form, and delivered; and the price paid by the purchaser to the proper receiving officer, and the sale fully consummated by ratification, such as the distribution of the proceeds or other act of confirmation, the purchaser cannot be legally ejected from the possession of property thus received, though the decree of condemnation should afterwards be reversed.

In the sale of a decedent's land under probate order, without general notice, it was held that the purchaser was not, by the apothegm *caveat emptor* or the principle embodied in it, precluded from compelling the heir or devisee to ratify the contract or rescind it—it having proved void. And it was further held that if the heir or his representative had received the

¹ *Voorhies v. Bank of the United States*, 10 Pet. 449; *Grignon's Lessee v. Astor*, 2 How. 341; *Foulke v. Zim-*

merman, 14 Wall. 113; *McNitt v. Turner*, 16 Wall. 365.

price and paid the decedent's debts with it, the court would compel a conveyance of title from the heir, if he could not successfully impeach the fairness of the sale.¹

Where the price paid at judicial sale, by the purchaser, has been applied to satisfy mortgages that rested upon land, the purchaser cannot be made to give up his purchase till the sum advanced by him shall have been returned by the beneficiaries of the payment, however defective his title.²

When the purchaser is seeking to rescind a void contract, *caveat emptor* cannot be successfully invoked against him, when the error was induced, or contributed to by the other contracting party, whether the error be of law or of fact;³ nor can the apothegm be applied to his prejudice, when the mistakes or errors of law or of fact, are mutual, where both parties are in fault.⁴

The purchaser may recover the price paid for a title which

¹ Bland v. Bowie, 52 Ala. 152, 162; Bell v. Craig, Id. 215.

² McQuiddy v. Ware, 20 Wall. 19; Peltz v. Clark, 5 Pet. 481; Sands v. Lynham, 27 Gratt. 304; Howard v. North, 5 Texas, 315; Hudgins v. Hudgins, 6 Gratt. 320; Valle's Heirs v. Flemming's Heirs, 29 Mo. 152; Shoyer v. Nickell, 55 Mo. 269; Evans v. Snyder, 64 Mo. 516; Gay v. Alter, (12 Otto) 102 U. S. 79; Elliott v. Labarre, 3 La. R. 554; Gormley v. Palms, 13 La. Ann. R. 213; Barelli v. Gauche, 24 Id. 324; Coulsen v. Wells, 21 Id. 383, 385; Latham v. Hickey, Id. 425; Blake v. Nelson, 29 Id. 245, 255; Brown v. Bonny, 30 Id. 174.

³ Torrence v. Bolton, Law R. 14 Eq. 124; Fane v. Fane, Id. 20 Eq. 698; Wheeler v. Smith, 9 How. 55; Schofield v. Templer, John. (Eng.) Ch. 116; Jordan v. Stevens, 51 Me. 78, 83; Snyder v. May, 7 Harris, 238; Ex parte James in re Condon, L. R. 9 Ch. Appls. 614; Evarts v. Strodes, Adm'r, 11 Ohio, 488; Brown v. Rice's Adm'r, 26 Gratt. 470; Hart v. Swayne,

L. R. 7 Chan. Div. 42; Cooper v. Phibbs, L. R. 2 H. L. Ca. 149; Sparks v. White, 7 Humph. (Tenn.) 86; Fitzgerald v. Peck, 4 Littell, 127; Freeman v. Curtis, 51 Me. 140; Drew v. Clarke, Cooke, 374.

⁴ Woodbury v. Charter Oak Ins. Co., 31 Ct. 517; Green v. Morris, 1 Beas. Ch. 165; Bingham v. Bingham, 1 Ves. Sr. 126; Stewart v. Stewart, 6 Cl. & Fin. 968; Champlin v. Layton, 1 Ed. Ch. 471, 475; Hitchcock v. Giddings, 4 Price Ex. 135; Earl Beauchamp v. Winn, L. R. 6 H. L. 223, 234; Jones v. Clifford, L. R. 3 Ch. Div. 790, 792; Rogers v. Ingram, Id. 357; King v. Doolittle, 1 Head. (Tenn.) 77, 86; Lawrence v. Beaubien, 2 Bail. (S. C.) 623; Stone v. Godfrey, 5 De G. M. & G. 76; Allen v. Hammond, 11 Pet. 71; Flynn v. Campbell, 6 Mon. 286; Bowling v. Pollock, 7 Mon. 32; Smith v. Robertson, 23 Ala. 312; Irick v. Fulton, 3 Gratt 193; Daniel v. Mitchell, 1 Story, 190; Broughton v. Hutt, 3 De G. & J. 510.

has failed because the judicial order of sale was made without the court's having jurisdiction to issue it.¹

§ 132. **Effect of a Purchaser's being Wrongfully Deprived of his Purchase by a Collateral Attack Upon the Judgment of Condemnation.** When the purchaser has obtained title under a perfectly valid decree *in rem*, and that decree and all its attendant proceedings, have become final without removal, or have been affirmed by the court of last resort; and all jurisdiction over the subject matter has been exhausted, both in the original and in the appellate court, what would be the effect as to the purchaser, should any court entertain a collateral attack upon that decree and title, and if the court of last resort should sustain the attack?

Such a state of things is practically possible, though judicially absurd. Should it happen, it seems clear that the purchaser could not be held at fault for lack of prescience to foresee such a result. It could not be charged against him that he was guilty of *laches*. The erroneous decree would be operative, because there would be no higher tribunal to correct it. He would be bound to give up the property, should there be judgment against him, though rendered *coram non judice*. But, should he sue the government to recover the price, in the Court of Claims, upon the implied contract of the vendor to return the money should the title prove void, it seems clear that, under the circumstances, the maxim, *caveat emptor*, could not be invoked, by the government, against him.

Nor could the government defend the action against it for the money paid, on the plea that the jurisdictionless judgment by which the purchaser was divested, was not valid, and, therefore, not operative except upon the parties to the ejectment suit; for the government has chosen to make itself exceptional, so that it cannot be called in warranty like other vendors, but can only be reached by direct action at law in the Court of Claims. Therefore, though not possibly a party in the collateral suit which attacked the valid decree and the title resting thereon

¹ Morgan v. Hammett, 23 Wis. 41; Trustees, v. Railroad, 1 Woods, C. C. Bell v. Craig, 52 Ala. 215, 217; Bland v. Bowie, 53 Ala. 153; Davis et al., 661.

and rightly springing therefrom, yet it is left in the position of a vendor who holds the price of that for which nothing has been given, according to a decision which cannot be avoided. Such decision bears upon the government, and produces practical results, precisely as though the tribunal rendering it had had full power to hear and determine the issue concerning the final decree *in rem*, and the title emanating therefrom. Clearly, in the latter case, the government could not plead a want of call in warranty, when sued for the price in the only court in which it allows itself to be sued; nor could it successfully invoke the maxim *caveat emptor*, since it does not appear that there was anything of which the purchaser should or could have been beware.

In the supposed case, the novel result would be that the valid decree under which the purchaser acquired the property, must be treated by both vendor and vendee as void; while the void decree by which the purchaser is ejected, must be treated as valid. The District Court in condemning and selling the property, must be treated as having been without jurisdiction, and so must the Appellate Court, in affirming the proceedings *in rem*, while, on the other hand, the State or Federal Court which virtually set aside the proceedings, decree and sale, and the final tribunal which affirmed the action, must, (so far as the particular case and parties are concerned,) be held to have had jurisdiction. So, where the title fails, and the purchaser sues to recover the money, he is as one who had bought under a void judgment and sale; yet, having bought when the judgment and sale were valid, he is not to be twitted with "*caveat emptor*."

CHAPTER XV.

THE NEW TITLE.

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§ 133. **The Title Without Reference to the Former Proprietor.** The "new title" is so styled, because it is not the old title of the owner before condemnation, transferred to the purchaser of the *res* after condemnation. It is truly, and in all respects, a new title without any reference whatever to the previous proprietorship of the thing, whether movable or immovable. It is not affected by any defects of the former owner's title, since they are all obliterated.

The proceedings not having been against any person but against the thing alone, they cannot logically convey to the government or any libellant or complainant, the title of any person. Such title becomes extinct when the thing is forfeited; and a new title arises by reason of the forfeiture, and vests in him who is decreed to have the *jus in re*. The former owner may, or he may not be known; he may have committed some offense, in, with, or by the thing, or some stranger may have done so; he may be an enemy, or some agent without his consent may have used his ship in breaking blockade; he may have had a good title to land or personal property, or he may have had a very bad one: is the new title to depend upon such possibilities? How, under the law of nations, could the purchaser of a ship condemned on one continent, know that the late owner, who may live upon another, possessed before forfeiture a good

title, free from all encumbrances? The system of procedure would not be practicable, under public law, if only the old title were conveyed under it. How could the purchaser of merchandise condemned, by direct action against it, know whether the owner before forfeiture, had not held it subject to the vendor's lien? The procedure would not be practicable, under municipal statutes, if only some given person's former title were conveyed by forfeiture. How can forfeiture be a mode of conveying the old title to some succeeding proprietor, in cases where the ownership is unknown?

The books treat occasionally of forfeiting as a mode of conveyance, but it is really a mode of extinguishing the old title and creating a new one simultaneously. The moment in which this is done is the instant in which some offense is committed by the use of the thing; or hostile character is acquired by the thing; or payment for which the thing was pledged or pawned has failed, if such be the contract. The subsequent judgment of condemnation is merely a judicial finding of the fact of the forfeiting, and a final seal of it.

§ 134. **Extinguishment of the Old Title.** The principle on which the law extinguishes the old title is found deeply imbedded in public policy. No one has the right to own property to the injury of society. Rights of ownership are not natural rights, and the law so regulates artificial rights that no man is allowed to exercise them to the great peril and detriment of his neighbor. While one may own an ox, and allow him to range the commons when not inhibited by local ordinances, he may not turn out a ferocious beast to prey upon his fellow-men. As a citizen, he must not use his goods to infringe municipal law. As an enemy, he has no rights of property in anything which the opposite belligerent is in duty bound to regard.

The extinguishment of the old title is sometimes not attended with the creation of a new one. Usually, it is true, the extinction of the old and the formation of the new, take place *eo instanti*; but that they are distinct acts appears from the consideration that there are cases in which the old is extinguished without a new title arising. An illustration may be found in the case of such property as book material, the title to which

is forfeited whenever the owner, or anybody else, pollutes it by printing obscene matter upon it for circulation; and drugs imported for criminal purposes.¹ At the moment of the forfeiting by the forbidden use of these things, what title does the government acquire? Not ownership, but merely the right to destroy the injurious book, or drug, under the police power of the government, in case it should be condemned by the proceedings *in rem* under the statute cited. Another similar provision is found, for the destruction of houses concealing dutiable goods on our northern border. So, while the government, either Federal or State, has the undoubted right to pass laws for the condemnation of such nuisances by proceedings *in rem*, for the purpose of their destruction, the owner of nuisance property would lose his title while the government would not gain one.

Evidently, then, there are possible cases in which forfeiture is not a mode of transferring title; and, in all cases, it would be much more consonant with the general principles of the system under consideration, and much less likely to mislead the inquirer, if the two simultaneous acts of extinction and creation be kept separate and distinct in mind.

§ 135. **The New Title Held "Complete and the Change Absolute."** Chief Justice MARSHALL speaks of the old proprietorship as a "lost" right, and of the new, as a "complete" title. He says,² "It appears to be settled in this country that the sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree."

"The new title," Judge STORY said,³ "acquired by the forfeiture, travels with the thing in all its future progress." Agreeing with the chief justice as to the old and new titles, Judge STORY states the origin of the new title to be the forfeit-

¹ United States Revised Statutes, §§ 2491, 2492.

² Williams v. Armroyd, 7 Cr. 423, 432.

³ Gelston v. Hoyt, 3 Wheat. 318.

ure, while the former inadvertently refers to the sentence as the period of change.¹

No one, it may safely be assumed, would doubt for a moment that a vessel condemned for the guilt of smuggling, or other contravention of statute incurring forfeiture, under the revenue laws, or the navigation laws, would be lost to its former owners;² nor would anyone contend that the holder of some lien against the vessel, which he had failed to assert upon the trial, could disturb the government's title acquired by forfeiture.³

§ 136. **Not Confined to Forfeited Offending Things.** And forfeiture of hostile property destroys the old title and creates a new, just as does forfeiture for guilt. An enemy vessel, captured by our navy, during a foreign war, and regularly condemned as lawful prize of war, because found to be hostile property, would become the property of the United States; and, that the title is new appears from the fact that the title of the former owner, whether good or bad, cannot affect the validity of the title now held by the government; indeed, the existence of any previous owner whatsoever is a matter of no importance, since the character of the vessel has been ascertained.⁴ The government has obtained title by suing that *thing*, and all the

¹ "The reason, however, of this rule," says he, pp. 319-20 of the cited case, "is to be found in the nature of proceedings *in rem*. To such proceedings all persons, having an interest or title in the subject matter, are, as we have already stated, in law, deemed parties; and the decree of the court is conclusive upon all interests and titles in controversy before it. The title of forfeiture is necessarily in controversy in a suit to establish that forfeiture; and, therefore, all persons having a right or interest in establishing it (as the seizing officer has) are, in legal contemplation, parties to the suit. * * * But if he were a mere stranger, he would still be bound by such sentence, because the decree of a court

of competent jurisdiction *in rem*, is, as to the points directly in judgment, conclusive upon the whole world."

² *Id.*; *Hudson v. Guestier*, 4 Cr. 295; *Hoyt v. Gelston*, 13 Johns. 141; *Certain Logs of Mahogany*, 2 Sum. 289; *Magee v. Beirne*, 3 Wright, 50, 64

³ *Imrie v. Castrique*, 8 C. B. N. S., 1, 405; *The Globe*, 2 Blatch. C. C. 427; *Thompson v. Steamboat Morton*, 2 Ohio, (State,) 26; *The Robert Fulton*, 1 Paine, 620; *Cammell v. Sewell*, 3 Hurlstone & Norman, 617.

⁴ *The Star*, 3 Wh. 78: Story, J.: "A sentence of condemnation completely extinguishes the title of the original proprietor, and transfers (?) a rightful title to the captors or their sovereign."

world, including the former owner and his privileged creditors have been parties, whether they had standing in court or not.¹

Now, in the application of the term "new title," it matters not whether the hostile property acquired by forfeiture be a ship captured, or a house seized under statute authority: if the thing, in either case, be unqualifiedly condemned, the title arising from the forfeiture is free from any defects that may have marred that of the late owner.

§ 137. **When New Title Does Not Arise.** The decree of restitution is *res judicata* so far as the *res* is adjudged at all; but where there is such judgment as to give up the *res* to the person from whom it was seized, it is not to be understood that a creditor holding a lien upon it is thus barred. His lien may have looked only to the proceeds in case of condemnation: why should he be prejudiced by the restitution? He may have been so sure that no condemnation could be pronounced against the thing on which his lien rested, as to forbear to present it; ought the claimant who has had restoration of the thing, be also relieved from his privileged creditors?

It is only true that "what was formerly before the court cannot again be drawn into controversy," *provided* there was final decision of the matter now again coming; but it is not true at all, if there were liens and interventions pending when the case was decided, and yet nothing decided but that the *res* be restored.

The decree of restitution is *res adjudicata*, but the new title does not arise from it. The owner does not get his property by any new right because it has been charged and acquitted. His own title is restored to him; not a new one; not one paramount. A "claim, whether a lien or a mere equity," is "totally displaced" if duly passed upon adversely, but not if the libellant fail to make out his case, and the claimant *therefore* have restitution. The claimant, upon restoration takes his property

¹ The American Cyclopaedia, *verbo* "Prize:" "If the sentence is one of condemnation, the title of the former owner is divested, and all nations are bound to respect the new title acquired under it." *Rose v. Himley*, 4 Cr. 291; *Croudson v. Leonard*, Id. 434; *Bradstreet v. The Neptune Ins. Co.*, 3 Sum. 600; *Penhallow v. Doane*, 3 Dal. 54.

just as he had it before seizure; for, even defaulted non-appears are not cut off, since the claimant has no interest or property in the judgment by default against them.

There is no charge nor transfer of title when there is a final decree of restitution, much less the new title. The property is restored with all its defects physical and titular, precisely as it was. As there has been no forfeiture in such case, the "new title from forfeiture" cannot have arisen.

§ 138. **The Title Paramount.** It has been held that when estates pass by operation of law by proceedings *in rem* where there is no expressed or implied contract between the former owner and the purchaser at a judicial sale under such proceedings, that the title paramount arises. It has been said that whenever the court, in its plenary legal power, leased upon the authority of the government, acts directly upon the property itself, and transfers the title without regard to the will of the owner, the case is *in rem*, and that the newly vested title is paramount and independent of the old one. Illustration of this has been sought in the seizure, sale and conveyance of an insolvent's property; in the order of sale, and the sale, by probate courts, of the lands of a decedent; in a proceeding to foreclose a mortgage, the sale thereunder, and the title given to the purchaser; and other illustrations have been given, and several decisions adduced to support the position.¹ But it is manifestly unjust that any lien holder should have his rights divested, in the absence of any notice, actual or constructive. If he has had no invitation to appear and make himself a party to the proceedings, he cannot legally be concluded by them. The foreclosure of a mortgage lien by the action *in rem*, with notice to none but the mortgagor; the condemnation of a decedent's estate to pay debts, with notice to none but the heirs; the condemnation and sale of an insolvent's property by pro-

¹ Grignon's Lessee v. Astor, 2 How. 338; Beauregard v. New Orleans, 18 How. 497; Pennoyer v. Neff, 95 U. S. 715; Florentine v. Barton, 2 Wall. 216; Satcher v. Satcher, 41 Ala. 26; McPherson v. Cunliff, 11 Sargeant

& Rawle, 432; Sheldon v. Newton, 8 Ohio State, 494; Perkins v. Fairfield, 11 Mass. 227; Paine v. Mooreland, 15 Ohio, 435; Robb v. Irwin, Id. 698; Saltanstell v. Riley, 28 Ala. 164; Benson v. Cilley, 8 Ohio State, 614.

ceeding *in rem* without notice to all interested; orders of sale under attachment process without general publication to all persons, cannot result in the complete title paramount to the injury of those who might have interposed valid titles, claims or interests of some kind, had they had the opportunity. In all such cases, doubtless the title paramount might be evolved, should proceedings against the things with published notice to all persons and default of all non-appearers, be authorized by statute, and fully carried out by the courts.¹

In cases of relative condemnation after universal notice; that is, in cases where the proceedings were for the vindication of the relative right, *jus ad rem*, the libellant, as judgment-creditor, sells the *res* to pay the debt for which it is bound by fiction of law, the purchaser may be said to acquire the title paramount, since he obtains the thing sold, free from all incumbrances; but he cannot be said to acquire the new title arising from forfeiture, since there has been no forfeiture.

§ 139. **Previous Steps Leading to the New Title.** Every successive step, from seizure to absolute forfeiture and sale and the delivery of the *res* to the purchaser with the evidence of ownership, has reference to the final consummation, the creation of the new title. To this end the seizure is required to be sufficient in all the particulars enjoined by law; the allegations against the thing seized must be accurate and certain; the notice must afford every one an opportunity to assert interests; the facts charged must be judicially found; the *status* of the *res*, whether it is really a forfeited thing or not, must be decreed; so decreed, the *status* must be deemed to have been what it is adjudged to be from the date of the origin of the primary responsibility of the thing; the sale must take place when required by statute, and as so required, through order of court, or otherwise, always now in market overt after due advertisement for the given time, containing an unmistakable description of the property to be sold; and the adjudication by the officer—the marshal in all government sales of the kind, or an auctioneer

¹ Vide, Book IV., Part II.

under his direction—to the highest bidder, lodges the new title in the purchaser.

It has not been thought necessary to dwell upon the incidents of such sale, the advertisement, the marshal's return, and the payment of the price into the registry, with the particularity with which seizure, notice and default have been treated; for, after condemnation, the proceedings assimilate closely to those following personal actions. It should be remarked, however, that the marshal, under the statutes, must cause the erasure of all incumbrances recorded against the property, and must give a written title deed to the purchaser with full description of the property, and with all the requisites of a good and perfect title, when the *res* is land, and such evidences of title as are usual, when other property is concerned where bare delivery would not suffice. It must be a guaranty deed to land, fully warranting the title to the purchaser, his heirs, administrators and assigns forever, when the *res* has been condemned and sold under such statute direction as that quoted in the immediately previous chapter.¹

¹ Ante, § 123.

BOOK II.

ACTIONS AGAINST THINGS GUILTY.

CHAPTER XVI.

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§ 140. **Guilty Use Irrespective of the Guilt of the User or Owner.** Things are condemned as guilty for their active or passive contravention of a statute having forfeiture as its sanction. By fiction of law, such contravention is deemed the fault of the things themselves; they are held responsible for offenses of omission or commission, imputed to them as though they were conscious and accountable; they are arrested and proceeded against as defendants; they are acquitted or condemned as though they were competent to stand in judgment for their violations of statutes.

The guilt of a thing is entirely without reference to its ownership. It does not matter whether there is any owner at all; for an abandoned thing might become guilty by the violation

of a statute. There may be an offending owner behind an offending thing, or there may not be: it is not essential that there should be. The owner may be perfectly innocent of any offense, yet his property be guilty. He may have entrusted it to an agent without authorizing the latter to use it in contravention of law; yet, if thus used, it might become forfeit. He may even have made it an instrument, in his own hands, of transgressing the law so as to become an offending thing, yet he himself remain innocent of any personal offense punishable under the violated statute, or in any wise under any other law. Neither the owner nor his agent, nor, indeed, any person whatever is necessarily guilty of any personal offense, when his property becomes forfeit as an offending thing, even though he made it to offend. For, the offense of a thing is very different from that of a person. It is never punishable: the only effect is the immediate change of *status*: that is, the property changes owners; the old title gives place to the new.

§ 141. **Offenses Attributed to Property.** Judge STORY has so well expressed the doctrine of the guilt of a thing while its owner may or may not have committed a personal offense by the use of the thing, that his exposition may profitably be adopted. Referring to seizure in revenue cases, he said: "The thing is here primarily considered as the offender, or rather the offense is primarily attached to the thing; and this whether the offense be *malum prohibitum* or *malum in se*."¹ "The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a willful disregard of duty; as, for example, in cases of collision and other wrongs done on the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of the law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity of the injured party."² "Many cases exist where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist where there is both a forfeiture

¹ The Palmyra, 12 Wheat. 14.

² The Brig Malek Adhel, 2 How.
234.

in rem and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*. This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments. Both in England and America, the jurisdiction over proceedings *in rem* is usually vested in different courts from those exercising criminal jurisdiction.”¹ To quote further from the case of the *Malek Adhel*: “The next question is, whether the innocence of the owners can withdraw the ship from the penalty of confiscation under the act of Congress? Here, again, it may be remarked, that the act makes no exception whatsoever, whether the aggression be with or without the coöperation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatever to the character or conduct of the owner. The vessel or boat, (says the act of Congress,) from which such piratical aggression, etc., shall have been first attempted or made, shall be condemned. Nor is there anything new in a provision of this sort. It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel, in which or by which, or by the master or crew thereof, a wrong or offense has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws; and has been applied to other kindred cases arising on embargo and non-intercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a

¹ The *Palmyra*, 12 Wheat. 15.

forfeiture attached to the ship by reason of their unlawful or wanton wrongs.”¹

The allusion to the application of the doctrine to embargo and non-intercourse acts, was with reference to C. J. MARSHALL’S decision in *The Little Charles*: “This is not a proceeding against the owner; it is a proceeding against the vessel for an offense committed by the vessel; which is not the less an offense, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner.”²

Chief Justice MARSHALL goes on from the end of the above quotation, as follows: “It is true that inanimate matter can commit no offense. But this body, [the ship] is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report.” But, suppose the *res* proceeded against, were a cargo of merchandise: would it not be equally liable to be considered as acting, though the personification would seem less appropriate? This case concerning the embargo laws, has been mentioned, because the learned judge treated the schooner as a guilty thing rather than a hostile thing: the distinction not being discussed. In passing, it may be remarked, that there are some expressions in the cases of the *Brig Malek Adhel* and the *Palmyra*, which indicate that Judge STORY wrote under the impression that proceedings *in rem* for piratical aggression belonged to the law of prize. It will be seen, *post*, Chapter on Piracy, that such cases belong to things guilty; so there need be no hesitancy in quoting from them to show the doctrine of things guilty without reference to the guilt or innocence of their owners or others in charge of such things.

Nothing more need be quoted here than this succinct sentence of Mr. Justice CURTIS: “There are many cases in which the vessel is treated as the offending thing, and is forfeited,

¹ The *Brig Malek Adhel*, 2 How. 233.

² The Schooner *Little Charles*, 1 Brock. 354.

wholly irrespective of the guilt of the owner, or the master.”¹ The principle applies alike to all offending property.²

§ 142. “Offense” and “Offender” not Employed in the Criminal Law Sense. It will be perceived that the terms “offense” and “offender,” as used in proceedings against offending things, are of very different meaning from their significance when employed in criminal law. As the *offense* attributed to a thing is wholly irrespective of the guilt or innocence of the person who used the thing as an instrument, so the *offender* is such wholly irrespective of the criminality of the act done or wrongfully omitted. *Offense*, in the system of law herein being treated, is not synonymous with either “crime” or “misdemeanor;” *offender* is not a term convertible with “criminal” or “criminal offender.”

The offender who causes property to be forfeited for some offense committed by its use, is not necessarily the owner of it, and, therefore, not necessarily a loser by the forfeiture. The guilt is in the thing and the condemnation is of the thing, by legal fiction, while the person who operates the thing, or who owns it, is neither guilty nor punishable necessarily; hence, the term *offender* is of very limited signification. It is a convenient term, though it has proved oftentimes misleading.

§ 143. Offenses Against the Law of Nations. “Offenses against the law of nations” is a phrase liable to be misunderstood, when applied to the system of which we are treating. By the constitution, Congress has power “to define and punish piracies and felonies committed on the high seas and offenses against the law of nations.”³ So far as punishment is concerned, it has reference to persons; and the prosecution of the criminals must be in the municipal courts, since there is no criminal court of nations. But proceedings for the forfeiture of ships engaged in piratical aggression, slave-trading or other

¹ The Porpoise, 2 Curtis C. C. 310.

² Banancoat v. Gunpowder, 1 Met. 230; Shaw, C. J.; Anonymous Case, 1 Gal. 23; Story, J.; United States v. La Vengeance, 3 Dal. 297; Marshall, C. J.; Barrels of Liquor, 47 N. H.

374; Sargeant, J.; Lilienthal's Tobacco, (7 Otto,) 97 U. S. 267. But, see Peisch v. Ware, 4 Cr. 347; Freeman v. 403 Casks of Gunpowder, Thacher's, Crim. Cases, 14.

³ Art. 1, Sec. 8, Clause 10.

practice generally inhibited by the laws of nations, are not for punishment. No criminal offender is prosecuted therein. The offense is the fictitious one which Judges MARSHALL and STORY have above described.

Sometimes blockade breaking, the carrying of contraband goods, and other acts of enemies, (or of one who, though nominally a neutral, becomes *pro hac vice* an enemy,) are spoken of by the courts as offenses against the law of nations; but, manifestly, the term "offense," in such connection, means not crime or misdemeanor, but merely violation of the law of nations. The enemy thus offending is not amenable to the municipal courts of the opposite belligerent; and, as before remarked, there is no such thing as a criminal court of nations; but the offense of the thing may give rise to proceeding *in rem* against it, in the civil court of nations, sitting in the county of the opposite belligerent.

§ 144. **Result of Treating the Owner of an Offending Thing as a Criminal Offender.** How erroneous to say that the enemy is a criminal offender on trial in such proceedings! Had the case of the *United States v. McVeigh's Land*, in the United States District Court of Virginia, been really a proceeding against an offending thing in a municipal court (instead of being what it was: a proceeding against a hostile thing in a court of nations;) and had McVeigh so used the land in committing an offense as to become an *offender* in the sense in which the term has significance in the law of proceedings *in rem*, he would not have been on trial for his punishment for any offense in the sense of crime or misdemeanor, or in any sense whatever. Yet, when he would not renounce his enemy character to come into court as a claimant, but insisted upon retaining it and pleading, and was therefore refused standing in court, (in accordance with the law of nations from time immemorial,) he invoked the highest tribunal of the country, and there he had much righteous indignation expressed that a man should have been "assailed" yet not allowed to defend himself; and, on the authority of criminal case precedents, the condemnation of the land was reversed, and the cause remanded with

instructions to the lower court to allow McVeigh to defend as a criminal on trial.¹

It would seem that there were, in the disposition of this case upon writ of error, some differences from the doctrine with regard to offenses and offenders, above expressed by MARSHALL, STORY, and others. 1. The owner of the land was treated as an *offender* in the sense of a *criminal*. 2. The libel of information itself was treated as a criminal information. 3. The land itself was considered as though it had been charged as a guilty or offending thing though there were no allegations that any wrong had been committed in, with, or by its use. 4. McVeigh was held to be a defendant who had been sued and then refused any defense to the action; not held to be an enemy denied appearance, in his enemy character, to claim affirmatively. 5. The case was treated as a suit *in personam*, not *in rem* as against hostile property. 6. It was treated as a case under municipal law and not under the law of nations.

Errors so serious and so numerous could hardly have happened, had the proper distinction between Things Guilty, Things Hostile and Things Indebted been kept in mind, or had even the universally admitted distinction between proceedings *in rem* and proceedings *in personam*, been observed. Certainly such errors could not have happened, had it been kept in view that the guilt of things is wholly irrespective of the guilt or innocence of the owners, as stated by Judge STORY, and as long settled by a continuous current of decisions.

The McVeigh case is not in accord with the settled doctrine, nor with the exposition of "offense" and "offender" as made by Judge STORY and Chief Justice MARSHALL, nor with the decisions generally which will be found cited throughout this second book.

The late cases show conclusively that the settled doctrine with regard to guilty use, and the significance of the terms "offense" and "offender," remain as they were before the McVeigh case was decided; and that an *offender* is not "assailed" as a personal defendant, where proceedings against a thing are

¹ McVeigh v. The United States, 11 Wall. 259.

instituted. Nor were any of the owners of enemy property, (condemned like that of McVeigh, under the confiscation sections of the Act of 1862,) "offenders" subjected to "punishment" by the civil process of confiscation; and consequently, the restrictions to the penalty for treason, (as expressed in the constitution, and re-expressed in a joint resolution by Congress,) could have no applicability to proceedings *in rem* under that Act.

§ 145. **Use and Misuse of Criminal Terms.** While "arrest," "condemnation" and some other criminal terms are used generally in suits *in rem*, (though less commonly when *indebted* things are defendant, than when *hostile* property is,) the terms "offense" and "offender," "guilt" and "guilty" are never proper in actions against enemy or indebted property, whether captured upon the water, or upon the land; whether seized upon sea or shore; whether captured by the navy by authority of the law of nations, or arrested by civil process pursuant to municipal statute authorizing the exercise of war rights against hostile property on land.

It will be apparent to the reader, upon a moment's reflection, that a delinquent pledgor, or a belligerent owner of captured property, cannot be properly called an offender. The pledged property of the one, or the captured of the other, is proceeded against as forfeited, not for an offense committed by the owner or by anybody, but on other grounds entirely. But there is always an offender back of a guilty thing—an offender, though not necessarily a criminal, as before stated.

The importance of confining the terms *guilt*, *guilty*, *offense* and *offender*, as used in the system of law under consideration, to the one class of suits *in rem* to which they belong, will be apparent, if the legal reader will examine the reports and see how often the misuse of these terms has led to erroneous decisions and much consequent wrong; for such misuse has, by no means, been confined to the case of McVeigh.

Hostile property is condemned, in a court of nations, upon the fact of enemy ownership appearing: but this fact may appear by proof that the hostile thing was taken from the enemy, (which would be sufficient,) or it might require the more round-

about proof of the breaking of blockade, the carrying of contraband goods, the trading with the enemy—any one of which subordinate facts would show that the captured thing had become enemy property. Now, it might be said that the breaking of blockade, the carrying of contraband goods, and the trading with an enemy, constitute *offenses*; that the person who thus uses a ship is an *offender*; that the ship thus might properly be, under legal fiction, styled a *guilty thing*.

While the application of these terms to such a person and ship might seem plausible at first view, yet such a ship and owner are not amenable to our municipal laws, and therefore are not proceeded against but in the prize court. The proof of any one of the acts mentioned, or of any one of many other acts not herein above mentioned, would show the ship or other thing to be in aid of the enemy and therefore enemy property, and liable to condemnation as such. Such property therefore is not *guilty* but *hostile*.

In consideration of the fact that the seemingly *guilty* vessels and other property found in *delicto*, have their guilty character swallowed up in the broader character of *hostile* or *enemy* property, they are relegated to the third book. The ground of condemnation for all such property is that it is of enemy proprietorship or possession; and, therefore, none of it can properly be classified with *guilty* property, nor be made subject to the peculiar principles that govern it.

§ 146. **Things Guilty and Things Hostile are Proceeded Against Under Different Systems of Law.** *Guilty* and *hostile* things are condemned under different systems of law: the first under municipal law; the second under the law of nations. The first, for being used in the committal of offenses under statutes, are proceeded against according to the law of the country, and forfeited. The second, for being found in the possession or service of a foe, are proceeded against according to the law of nations, and summarily confiscated. Examples of the first species of things may be found in silks forfeited for having been smuggled, and land forfeited for having been used as the site of an illicit distillery. Examples of the second may

be found in prize ships confiscated, or lands confiscated, for having been owned by an enemy.

Several nations have municipal statutes for defining their respective methods of procedure against hostile property. The methods differ in details, but cannot as to the general law under which *right* of procedure is obtained—the law of nations. We have our methods defined by statutes: our prize act, and our confiscation acts.

As to procedure against indebted property, it differs from both of the other two as to the system of law under which it operates, which will be elucidated when that interesting branch of the general subject shall have been reached.

§ 147. **Guilty Intent Imputed to Things.** Guilty or fraudulent intent is sometimes imputed to a thing, when no act is perpetrated in, with or by the thing; and such intent coupled with an attempt to carry it out, is made a statute offense, and the property forfeited as an offending thing. It was said by the Supreme Court: "The attempt to pass dutiable goods through the custom house, with intent to defraud the revenue, by means of false, forged or fraudulent invoices, is an offense which, in effect and result, is very much akin to that of smuggling."¹ And again: "The question is whether goods have been imported into the United States without having such a manifest on board as is described in the 23d section of the Collection Act of 1799. An importation is complete when the goods are brought within the limits of a port of entry, with the *intention* of unloading them there."²

"Most of the forfeitures denounced by our laws," says Judge CONKLING, "are imposed for omitting to do some act enjoined by law."³

§ 148. **Some Statute Causes of Action In Rem.** By way of illustration, may be mentioned some of the offenses of omission

¹ United States v. 67 Packages of Dry Goods, 17 How. 93.

² United States v. 10,000 Cigars, 2 Curtis, C. C. 436. See United States v. Vowell, 5 Cr. 368; Arnold v. United States, 9 Cr. 104; Brown v. Md.,

12 Wheat. 453; Meredith v. United States, 13 Pet. 494; Harrison v. Vose, 9 How. 381; United States v. Lyman, 1 Mason, 499.

³ Conkling's Treatise, 4th Ed. 548.

and commission, for which things may be seized, tried and condemned; confining the examples, for the present, to things guilty under the revenue laws.

Under the provisions of the Internal Revenue Laws, the government, for violations of those laws, may proceed to seize and condemn:

1. Land and buildings used for the purposes of a distillery, without bond;¹ or leased for such purpose;² or so used when false entries, reports, etc., are made;³ or used for the fraudulent manufacture, removal, etc., of cigars.⁴

2. Personal property: apparatus for distilling or rectifying spirits, or compounding liquors when the tax due is unpaid, and all personal property found in the establishment with such apparatus;⁵ adulterated casks of distilled spirits, the tax being unpaid;⁶ unregistered stills;⁷ spirits illegally removed from the distillery;⁸ unmarked casks of spirits for sale;⁹ spirits, with the horse, vehicle, boat, etc., used in illegally removing them by night, under given circumstances;¹⁰ property used in bottling unstamped fermented liquors;¹¹ utensils, vessels and apparatus used in making fermented liquors, if tax or entries, etc., be evaded;¹² such liquors, removed with tax due, without permit;¹³ tobacco purchased with tax unpaid;¹⁴ or with stamp omitted,¹⁵ together with all raw material, machinery, tools, etc., found in the factory;¹⁶ peddler's horse, mule, wagon, etc., used in peddling tobacco, if he refuse to show his certificate, etc.;¹⁷ cigars unstamped;¹⁸ unstamped medicines, perfumery, cosmetics, etc., under certain circumstances;¹⁹ boats, carriages, horses, etc., used in fraudulently removing taxable commodities with tax unpaid, and utensils used in making them, and casks containing them;²⁰

¹ U. S. Rev. Stat., §§ 3260, 3281, 3310.

² Id., § 3281.

³ Id., § 3305.

⁴ Id., § 3400.

⁵ Id., § 3242.

⁶ Id., § 3252.

⁷ Id., § 3258.

⁸ Id., §§ 3299, 3449.

⁹ Id., § 3323.

¹⁰ Id., § 3323.

¹¹ U. S. Rev. Stat., § 3354.

¹² Id., § 3340.

¹³ Id., § 3352.

¹⁴ Id., §§ 3367, 3398.

¹⁵ Id., § 3370.

¹⁶ Id., § 3370.

¹⁷ Id., § 3383.

¹⁸ Id., § 3399.

¹⁹ Id., §§ 3437, 3431, 3432, 3435.

²⁰ Id., § 3450.

empty stamped packages fraudulently used;¹ and, generally, all casks, cases, vessels or other packages which shall have contained forfeitable spirits, etc.²

Under the Collection Laws, the government, for offenses committed through the instrumentality of things, or for offensive omissions, has the right to seize, and condemn as forfeited, property illegally transported;³ concealed merchandise owing duties;⁴ smuggled goods;⁵ unreported distilled spirits and wines from foreign countries;⁶ sea-stores not manifested, or landed without a permit;⁷ articles surreptitiously imported with baggage;⁸ merchandise, consigned to any officer or seaman of the importing vessel, but not manifested;⁹ goods fraudulently omitted from the invoice;¹⁰ goods illegally unladen, without a permit;¹¹ vessels transferring goods to be unladen without a permit;¹² imported goods unladen in the night without permit, and vessels importing them, if the goods be worth more than four hundred dollars;¹³ imported spirits or wines landed without being permitted and marked "inspected;"¹⁴ merchandise, if the subject of a false oath by the owner, importer or consignee, on an examination before the customs officer;¹⁵ bonded merchandise for failure to deliver it duly to the designated collector; and the ship transporting it, if the failure is by the master or owner;¹⁶ goods exported to Mexico, or the British North American provinces, yet brought into the United States;¹⁷ merchandise not agreeing with the re-exportation entry;¹⁸ merchandise and vessel landed in a United States port after entry of the goods for exportation, with intent to draw-back the duties, etc.;¹⁹ goods fraudulently and falsely entered;²⁰ horses, vehicles, etc., illegally conveying merchandise under given circumstances;²¹ dutiable

¹ U. S. Rev. Stat., § 3455.

² Id., § 3457.

³ Id., §§ 3059, 3062.

⁴ Id., § 3066.

⁵ Id., § 3082.

⁶ Id., § 2775.

⁷ Id., § 2797.

⁸ Id., § 2802.

⁹ Id., § 2809.

²⁰ Id., §§ 2839, 2864.

¹¹ U. S. Rev. Stat., § 2867.

¹² Id., § 2868.

¹³ Id., §§ 2871-2-4.

¹⁴ Id., §§ 2883-4.

¹⁵ Id., § 2924.

¹⁶ Id., § 3001.

¹⁷ Id., § 3008.

¹⁸ Id., § 3033.

¹⁹ Id., § 3049.

²⁰ Id., § 3051.

²¹ Id., § 3062.

merchandise found concealed;¹ goods smuggled;² merchandise, vessel, etc., if manifest not delivered to the collector nearest to the boundary line, etc., when brought from a contiguous country;³ "sealed property," if not promptly taken to the designated post, etc.,⁴ or if seal be broken;⁵ building near the boundary for concealing dutiable goods;⁶ vessels for proceeding inland without a permit,⁷ and merchandise evading transportation regulations, under given circumstances.⁸

There are many provisions for the forfeiture of vessels under the navigation laws. Many other grounds of forfeiture will appear before the treating of offending things shall have been concluded.

It should be remarked, in advance, that the general principle, that forfeiture is irrespective of the owner, is subject to legislative modification; and it has been enacted that in any proceeding against goods, wares and merchandise to have their *status* as forfeited things declared in favor of the United States, intent to defraud shall constitute a necessary part of the offense; and any question involving such *animus* must be disposed of as "a distinct and separate proposition."⁹

¹ U. S. Rev. Stat., § 3066.

² Id., § 3082.

³ Id., §§ 3099, 3100.

⁴ Id., §§ 3102, 3103, 3104.

⁵ Id., § 3106.

⁶ U. S. Rev. Stat., § 3107.

⁷ Id., § 3109.

⁸ Id., § 3110.

⁹ Act June 22, 1874, § 16; 18 Stat. L., p. 178.

CHAPTER XVII.

INTERNAL REVENUE FORFEITURES.

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§ 149. **Offenses by Things in General.** Many provisions of the Internal Revenue Laws are foreign to the subject in hand. The majority of the penalties are recoverable by personal action. Much of the statutes is devoted to official duties, and much to the collection of taxes. Although many crimes and misdemeanors are created, and the punishment provided, yet it must be borne in mind that the internal revenue system is mainly for the purpose of replenishing the public treasury, and that the punishment of frauds is incidental—merely to remove obstructions to the collection of the revenue. The penalty for many of the frauds and personal offenses mentioned in these laws, is by fine and imprisonment.

Where offenses against the Internal Revenue Laws are committed in, with or by some *thing*, that itself is proceeded against as authorized in many sections of Title xxxv. of the Revised Statutes of the United States. This treatise will be confined to the proceedings *in rem* thus authorized, so far as the Internal Revenue Laws are concerned; though provisions on other topics

will be noticed whenever they will lend light to the subject directly under consideration.

Though the fines, imprisonments, various penalties, and the forfeitures authorized in these laws may seem, at first view, rather severe, we must consider the difficulty of collecting government dues, the disposition of many to cheat the treasury whenever they can, the class of men usually engaged in liquor manufacture, the facilities for fraud, and the fact that in some parts of the country the distillery business has carried illicit whisky-making to that degree of refinement which is the poetry of crime. "Moonshiners" and their nightly exploits amid the mountain fastnesses of Tennessee and neighboring States are likely to afford material for many a tale by the future romancer.

This treatise has to do with the revenue law as it is, unconcerned about the question of the severity or lenity of statutes. The primary responsibility of things for guilt is the only fiction with which it has to do, with reference to the laws of internal revenue.

§ 150. **Illicit Rectifying, Etc.** The following shall be forfeited wherever found:

1. All distilled spirits or wines;—
2. All apparatus fit to be used for the distillation of spirits;—
3. All apparatus fit to be used for the rectification of spirits;—
4. All apparatus fit to be used for the compounding of liquors;—
5. All apparatus intended to be used for the distillation or rectification of spirits;—
6. All apparatus intended to be used for the compounding of liquors—owned, in any one of the above cases, by a person who carries on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, or manufacturer of stills, who "has not paid the special tax as required by law."

And the following shall be forfeited, if "found in the rectifying establishment, or in any building, room, yard or inclosure connected therewith, and used with, or constituting a part of the premises:"

1. All distilled spirits or wines.
2. All personal property.

The section containing the above provisions, (R. S. 3242,) makes the *offense* of the owner of the property to be the carrying on of the business of rectifier, liquor dealer, or manufacturer of stills, *without having paid the tax*.¹ This offense is, not the failing to pay, but the carrying on of the business without having paid. Had failing to pay been made the offense, the provision would have been liable to the serious objection that the forfeiture authorized would not be based upon any right to the thing proceeded against for condemnation. The tax might lawfully have been made a lien upon the property, and proceedings *in rem* might have been properly taken against it, as a *thing indebted*, and it might have been condemned to pay the debt, and sold therefor in such quantity as might be necessary, or wholly sold, with the *surplus*, if any, to be returned to the debtor, after the satisfaction of the United States in the capacity of creditor.

But the carrying on of the business is properly made an offense for which the offender may be personally prosecuted, fined and imprisoned, as provided in this section; and the *offending things* may also be prosecuted, found guilty and condemned to entire forfeiture, whatever their value.²

But are the things specified in the section, necessarily guilty of having been used in contravention of this provision? For instance, "all distilled spirits and wines," owned by a liquor dealer, wherever the liquors may be found:³ could the offense of liquor dealing without license in New York City, be imputed to the wines in the private cellar of the dealer's country residence? Is it impossible for the maker of stills to have liquors somewhere in his possession innocent of the offense of being used in the manufacture of stills? Is it not carrying presumption far when we say that apparatus "fit" to be used

¹ By § 3224, suits restraining assessment or collection of any internal revenue tax, are inhibited. *Kissenger v. Bean*, 7 Bissell, 60; *Pullen v. Kissenger*, 11 Int. Rev. Rec. 197; *LeRoy v. The East Saginaw R. R. Co.*, 18 Mich. 234; *Alkan v. Bean*, 23 Int. Rev. Rec. 351.

² *Thatcher v. United States*, 15 Blatchf. 15, with reference to R. S. §§ 3249, 3451.

³ *United States v. Feigelstock*, 14 Blatchf. 321: *Held*, that this section was not violated by the selling of liquor not manufactured by the seller, having been taken for debt.

for the reprobated callings, (and probably also fit for some lawful use,) is to be stigmatized with guilt, though found many miles away from the seat of illicit business?¹

§ 151. **Intent to Use.** Intent to use is often made ground for the forfeiture of an article,² and such ground of *jus in re* is not objectionable here. It is sometimes difficult to prove such intent; and, under this section, apparatus found far away from the place where the unlawful work is carried on, might have suspicion attached to it from the facts of its belonging to the wrong-doer and its fitness to aid in the wrong, and the likelihood that one will use his own tools to do his own work.

The *jus in re*, founded upon the intent, will hold good, supported by proper proof of the other facts—ownership, and “carrying on” without previous payment of the tax; and the interrogatories propounded in the second preceding passage, may be answered by saying that even liquors found in a private cellar far away from a still-maker’s business,—and apparatus belonging to an offender but not necessarily used, or intended to be used in offending, may possibly be proved guilty of intent and rendered forfeitable; but the section goes too far in making such things necessarily so by reason of their ownership; and guilty use, or intent to use, should be alleged and proved, if we would forfeit such property. An apparatus for domestic use may be “fit” for use in making stills, but if found far away from the factory, the right to condemn it as guilty because of ownership by the manufacturer is not apparent.

Had the legislator said “fit *and* intended,” instead of connecting the terms by a disjunctive, he would have avoided the difficulties suggested.

With regard to the articles found in the establishment, note the legal requirements in order to forfeiture, as follows:

1. They must be found in the rectifying establishment or some building, room, yard, or enclosure connected therewith, and used with, or constituting a part of the premises. The latter clause refers to the rectifying establishment—not to the forfeitable things found in it. That is to say, the phrase “used

¹ United States v. 372 Pipes of Spirits, 5 Saw. 421.

² Felton v. United States, (6 Otto,) 96 U. S. 699.

with or constituting a part of the premises," means "some building," etc., "used with or constituting a part of the premises" of the rectifying establishment.

2. This provision does not extend to establishments for distillation without rectification; for compounding; for liquor dealing, or the manufacture of stills.

3. It is not confined to articles owned by rectifiers, compounders, distillers, liquor dealers and still-makers, but includes those owned by any person.

4. The only forfeitable articles found in the rectifying establishment are "distilled spirits," "wines" and "personal property." Other liquors than distilled spirits and wines are forfeitable only because they come under the general designation of personal property.¹

The only consideration by which a right to all the species of personal property found therein may be said to be vested in the government, so as to give ground for condemnation for guilt, is the general and plausible presumption that all such chattels are in use, or intended for use, in illicitly rectifying spirits. Congress has acted upon such presumption, and may not have gone further towards the limits of constitutional restrictions than legislators had traveled before.²

§ 152. **Adulterating Spirits to Defraud.** Guilt attaches to every cask or package, with its contents, for the act of any person in adulterating the distilled spirits contained in it, by adding any ingredient for the purpose of creating a fictitious proof, before the tax is paid. Section 3252,³ (R. S.) containing this enactment, may be simply analyzed as follows:

1. The offense of the thing consists in its being used to defraud the government.

2. The method of such use for the purpose of defrauding consists in the addition of some substance to the distilled spirits for the one specified object of creating a fictitious proof.

¹ United States v. Smith, 8 Wall. 587; United States v. 35 Barrels, 9 Int. Rev. Rec. 67; United States v. Page, 2 Saw. 354.

² The mash, wort, etc., must be sus-

ceptible of producing spirits when distilled. Sec. 3247; United States v. Frerichs, 16 Blatchf. 547.

³ See United States v. Glab, 99 U. S. 225.

3. The time of the offensive adulteration is prior to the payment of the tax.

4. The guilt and condemnation of the cask or package are consummated without reference to any act of the owner done, or caused to be done, by him. Whether the adulteration be made by him or by any other person, the guilt attaches to the cask and contents.

§ 153. **Not Registering a Still.** Section 3258, (R. S.) provides that every still or distilling apparatus set up but not registered immediately as required in that section, shall be forfeited; also all personal property in the possession or control of the person possessing or controlling such still or apparatus, and found in the building where it is set up, or in any yard or enclosure connected with the building.

The registry required is made by subscribing duplicate statements, in writing, setting forth the particular place where such still or apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which it has been, or is intended to be used: the statements must be filed with the collector. Such registry must be made immediately upon the setting up of the still.

Under this section, the offense consists on the part of the still or apparatus in being set up by the custodian for distilling purposes without being immediately registered; and, on the part of the other personal property, in being within the distillery or contiguous to it, presumptively in use by the person in charge for the same general purpose.

It is a matter of indifference, under this statute, whether the setting up and failing to register is done by the owner or by an agent; nor is the proprietorship of the other personal property, within or about the distillery, a matter of consequence.

The fiction of guilt is applied to the offending articles. Any apparent hardship may be avoided by registering, when the name of the owner would be disclosed, and the forfeiture would not be incurred.

§ 154. **Not Giving Bond.** Forfeiture of "the distillery, distilling apparatus, and all real estate and premises connected therewith," shall be incurred if the distiller fail to give the

required bond when commencing business; or to renew it, as required by statute. R. S., § 3260.

How both the distillery and the land are infected with guilt by their passive part in commencing the business, and the omission of the distiller (who may not be the owner,) will appear by noting the purpose of the bond.

The conditions of the obligation are that the obligor, (who is about to commence the business of distilling, or about to enter upon a new period of such business,) shall: (1.) Faithfully comply with all the provisions of the law relating to the duties and business of distillers. (2.) Pay all penalties incurred, or fines imposed on him for violation of any of the said provisions. (3.) Not suffer the land or distilling apparatus to be incumbered by mortgage, judgment or other lien. And the obligation itself is to pay, as a penalty, double the amount of tax on the spirits that can be distilled, by his apparatus, in fifteen days; and there must be two sureties.

What is the offense? The offending things become such by being abused by an offending person who contravenes the law. His offense is not the failure to give a necessary bond required by the § 3260; it is the illicit distilling;—for all such distilling, prior to the giving of the bond, is forbidden.¹

It is a good deal to require of a man that he shall protect the "tract of land" against being incumbered by any mortgage, judicial or conventional, though he may not own a foot of it; and pay all penalties incurred and fines imposed on him, (by the Treasury officers?) as above qualified. The topic in hand has nothing to do here, however, with the somewhat extensive powers given to officers of the internal revenue—perhaps necessarily given; but occasion may arise in a subsequent chapter, to discuss real estate forfeitures under this and other provisions of the title of the Revised Statutes now under consideration.

What is forfeitable under this section, 3260?

1. The distillery.

¹ A distiller's liability to the forfeiture of property for the fraudulent violation of the Internal Revenue Laws is not affected by the conniv-

ance of a government storekeeper. *United States v. Distillery at Spring Valley*, 8 Benedict, 473.

2. The distilling apparatus.

3. All real estate and premises connected therewith.

A word here may be proper relative to the third thing forfeitable, though more than one word is required on real estate forfeitures for guilt, further on. The occurrence of the sentence, "he shall not suffer the lot or tract of land on which the distillery stands * * * to be incumbered by mortgage," in the first part of this section, might mislead some to the conclusion that any tract of land or farm on which illicit distilling is commenced before the required bond has been given, is wholly forfeitable. Evidently this provision is for the purpose of protecting the interests of the United States so as to enable the government to "make the money" in case of a personal suit against the distiller, brought on the bond. The tract of land, farm, plantation, on which the distillery stands must be kept unincumbered.

But how can this protect the interests of the government, if the judgment-debtor does not own the tract? If this section stood alone, there would be evident inconsistency here; but there are other provisions making the *lessor* of distillery buildings and premises liable; and we shall hereafter see whether those enactments harmonize this inconsistency.¹

In construing this 3260th section, however, the phrase, "lot or tract of land on which the distillery stands," used in description of the bond should not be confounded with the phrase, "all real estate and premises connected therewith," *i. e.*, with the distillery; for if the first be used to illustrate the second, we shall most likely be led into error.

§ 155. **Only Used Land Forfeitable.** The forfeitable real estate is confined to so much as is connected with the distillery; so much as is reasonably necessary to it—not absolutely necessary but conveniently serving to further the general purposes of the business illicitly carried on. Not only the ground on which the distillery stands, the yard through which there is egress and ingress of men and barrels, but there might be a lot

¹ United States *v.* Hodson, 10 Wall. 395; United States *v.* Powell, 14 Wall. 493; United States *v.* 35 Barrels, 9

Int. Rev. Rec. 67; Osborne *v.* United States, 19 Wall. 577.

of ten acres or more devoted exclusively to the business, so as properly to be considered "connected with" the distillery, and therefore guilty and forfeitable.¹

But such illicit distillery situated on a farm would not render the whole "tract of land," with its innocent cornfields, liable, even though the corn were destined to be converted to whisky, (for such destination would be too remote to constitute the fields offending things.) There are distilleries situated on large cotton and sugar plantations; but who would say that the failure to give the proper bond, or the giving of a false, a forged, or a fraudulent bond, would forfeit such a plantation, though the illicit distillery should be situated upon it?

Had Congress distinctly said that every farm or plantation on which such distillery should be situate, shall be forfeited, it would have exceeded its powers. Congress cannot make that guilty which is innocent; cannot make that fictitiously guilty, which is not used, or intended to be used, by some personal offender, in contravention of law. To hold a cotton plantation of a thousand acres guilty of being used, or of being intended to be used in contravention of law, simply because some one sets up the distillery business, before giving the required bond, on some acre, or some few acres of the tract, is simply preposterous. For, though lands immeasurable may be liable to condemnation by proceedings *in rem* as *hostile*, we can hardly conceive how any very considerable quantity could be so liable as *guilty* property;—as an *offending* thing;—as a thing, by the instrumentality of which, the law has been violated.

It was held lately, by the United States Circuit Court, sitting in New Jersey,² that the entire property could be condemned under this section, 3260, (and sections 3303, 3305) though the question does not seem to have been raised whether or not all of the property had been used in the committal of the offense. It was held, in this case, that the property had been forfeited, though the owner was not privy to the committal of the offense, and that the condemnation related to the commission of it, so

¹ 372 Pipes of Spirits, 5 Saw. 421.

² *Heidritter v. Oil Cloth Co.*, XI. Reporter, 595, (March, 1881.)

as to avoid all intermediate transfers. But the court questioned whether liens were divested by the condemnation; and it referred to *United States v. Mackoy*,¹ as a case in which the question had been raised but not adjudicated. It seems singular that such a result can be judicially questioned at this late day; for what idea of the notice to all persons having any interest *in* or to the *res*, to appear, must be entertained by the querist? What notion of the default? Why should the holder of a *jus in re* be divested, yet the defaulted holder of a *jus ad rem* not be divested?

Section 3279 authorizes the forfeiture of all horses, carts, drays, wagons or other vehicle or animals used in carrying or conveying distilled spirits to or from a distillery, etc., at which the required sign, prescribed in this section, is not displayed.²

§ 156. **Distilling Without Bond.** Section 3281³ covers some of the ground of section 3260, just examined, and much broader ground.

The offenses of the offending persons are:

1. Carrying on the distillery business without giving bond.
2. Engaging in it, or carrying it on, with intent to defraud the United States of the tax on spirits distilled by the person so engaged.
3. Knowingly suffering the business to be so carried on, or conniving at it, on the part of the owner of the premises.
4. Suffering *ingress* or *egress* to or from such distillery through other property.

The things to which the guilt is imputed, are:

1. Distilled spirits and wines, owned by the distiller, wherever found.⁴

¹ *United States v. Mackoy*, 2 Dillon, 299.

² *United States v. Flynn*, 15 Blatchf. 302.

³ The Whisky Cases, (9 Otto.) 99 U. S. 594.

⁴ *United States v. Feigelstock*, 14 Blatchf. 321: *Held*, that under § 3281, the forfeiture does not operate when the statute is violated, but only at the time of the seizure of the spirits or

wines. *Summers v. Clark*, 29 La. Ann. 93, lays down the general rule to be that where, by the terms of the United States Revenue Laws, the penalty of its violation is the forfeiture of the goods without alternative, then the property in said goods vests at once in the United States; and no purchaser, however innocent, can acquire any title to it. *United States v. 64 Barrels of Spirits*, 3 Cliff. 308, is to

2. Stills and other apparatus fit or intended to be used for the distillation or rectification of spirits, or the compounding of liquors, owned by the distiller, wherever found.

3. Distilled spirits, wines, and other personal property, found in the distillery or in any building, room, yard or enclosure connected therewith, and used with or constituting a part of the premises, whether owned by the distiller or not.

4. The right, title and interest of the distiller in the lot or tract of land on which such distillery is situated.¹

5. All right, title and interest, in the lot or tract, of the person who has knowingly suffered, or connived at, the carrying on of the business of illicit distillery on such land.

6. All personal property, owned or possessed by any person who has allowed any building, yard or inclosure to be used for ingress or egress to or from the distillery, found in such building, yard or inclosure.²

7. All the right, title and interest of every person in any premises used for ingress or egress to or from the distillery, who has knowingly suffered such use.³

Let us now go over this list of things, and briefly see whether they can be rightfully charged with guilt as provided in this section of the statute.

The first item is too broad. It cannot be that distilled spirits *and* wines, (to adopt the copulative conjunction because it better expresses the legislator's meaning,) are guilty, wherever found, simply because they belong to the distiller who is carrying on

the same effect. If it be conceded that where the government must make election between alternate penalties, the forfeiture is not to be deemed to have taken place at the time the offense was committed, so as to avoid all intermediate transfers, the concession would not support the doctrine of *United States v. Feigelshtock* with reference to R. S. § 3281, for that section does not make the forfeiture depend upon the government's choice between alternate remedies. The personal fine is independent of the forfeiture of the

guilty things, in that section. The court may have been influenced by the manifestly erroneous ruling, on this point, in *United States v. 100 Barrels of Spirits*, 2 Abb. U. S. Rep. 93.

¹ *Dobbins' Distillery*, 6 Otto, (96 U. S.) 395.

² *Three Tons of Coal*, 6 Bissell, 379.

³ See *United States v. Frericks*, 16 Blatchf. 547, with reference to R. S. § 3247. And *United States v. Myers*, 3 Hughes, 239, with reference to R. S. § 3182.

his business without a bond, and in fraud of the government; for, while illicitly distilling in Maine; he might have in New Orleans imported distilled spirits and wines. What could these imported liquors have to do with the illicit business in Maine? How can guilt be imparted to them under the system of law herein treated? How can that be made guilty by statute which is not so either in fact or under the fiction known to legal science? There is no *jus in re*. To take such property by proceedings *in rem* would not be to take it by "due process of law."¹

Similar reflections might be applied to the second item in the list of things, concerning those stills and apparatus found far away, and not under suspicious circumstances; but this was sufficiently alluded to in a former section.

§ 157. "**Part of the Premises.**" While personal property "constituting a part of the premises," as described in the third division, seems rightfully made forfeitable, it is hardly so in the sixth, unless the quoted phrase of this sentence be understood to apply to it also.² A neighbor might suffer ingress and egress, through his yard, to and from the distillery, and we might condemn his yard; but why condemn his horse and carriage hitched in the yard? Why condemn a library left in the neighboring building, even if the distiller passes through the house every day in going to his distillery? What would the books, (if not on the art and science of liquor compounding or some kindred topic, and used to further the illicit business,) have to do with the fraud upon the government, even if owned by the illicit distiller? Does either the lessor or the lessee, the active perpetrator of the fraud or the passive sufferer of the illicit distilling, commit his offense in, with or by the books? Fraudulent ingress and egress must be within the knowledge of the owner of the premises.³

Now let us see whether the adjunct, "constituting a part of

¹ United States v. 372 Pipes of Spirits, 5 Saw. 421.

² The Collector Beggs, 17 Wall. 182; Dandalet v. Smith, 18 Wall. 642; United States v. Nissley, 1 Dill. 586;

Clinkenbeard v. United States, 21 Wall. 65; Barker v. White, 11 Blatch. 445; United States v. Black, Id. 538.

³ Gregory v. United States, 17 Blatchf. 325.

the premises," can be rightly understood to apply to the sixth class of guilty things, under section 3281. The exact words are: "All personal property owned by or in possession of any person who has permitted or suffered any building, yard or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in such building, yard or inclosure * * * shall be forfeited to the United States."

The personal property cannot be understood to be necessarily a "part of the premises," by a fair construction of the language; and unless the information charge that it is so connected, and that it is guilty by reason of illegal use or illegal intent on the part of some personal offender, (known or unknown to the prosecutor as the case may be,) and thus brought under the third designation of guilty things in the analysis of this section, it cannot be rightfully condemned. The general words should be restricted, by interpretation, to their legal significance.¹

And the prosecuting officer could not conscientiously charge, against the household goods in a dwelling house through which the distiller and his employés enjoyed servitude in passing to some back-yard distillery, that such goods were guilty as used for the commission of any of the offenses created by, or named in the section under discussion, or any part of the Internal Revenue Laws. There would be no conceivable relation between such things and the offenses or the personal offenders.²

§ 158. **Offending Lands.** The fourth, fifth and seventh things, in the analysis, are forfeitable to a limited extent. Land owned by the distiller, or leased to him for the purpose of illicit distilling, may be condemned so far as guilty, but not in quantity so large as to preclude the idea of its forming a part of the business establishment. Here the legislator dis-

¹ United States v. 33 Barrels of Spirits, 1 Low. 239, 242; Coolidge v. Williams, 4 Mass. 140; Sprague v. Birdsall, 2 Cow. 419; Sanderson v. Dobson, 1 Excheq. 141; Rex v. Mosley, 2 B. & C. 630.

² To warrant a forfeiture of "tools, implements or other personal pro-

perty," it must appear that the thing was used or intended to be used, in contravention of the statute. A grocery store, in the basement of a three story building, with a distillery in the attic: groceries not forfeitable. 33 Barrels of Spirits, 1 Low. 239.

tinctly declares that the tract of land on which the distillery stands, or across which the wrong-doer goes, shall be forfeited. In the section on the bond, above discussed, the words "tracts of land" were confined to the description of the bond, but now we have to do with them in the denunciatory part of the statute, desisting, however, from any enlargement further than to repeat that only such acreage as is used for distilling purposes, and for ingress and egress, (so that they can be properly charged, in an information, with imputed guilt,) can be rightfully condemned, whatever the text may say. The fourth and fifth designations must be reduced in proportion so as to tally with the seventh in the narrower bounds: "any premises used."

The language is, "the right, title and interest" in the lot or tract of land, both when treating of the distiller's real estate and the lessor's. It is repeated a third time when the land of the neighbor, trodden over in going to and coming from the distillery, is denounced. Would any lawyer be likely to misunderstand these words, and construe them to limit the authorized condemnation to a life tenancy—to a mere possession measured by the life of the contravenor of this municipal statute, if, indeed, his interest were a *fee-simple* estate?

Yet it has been urged, with apparent seriousness,¹ that Art. 3, Sec. 3, Clause 3, of the Constitution, inhibits forfeiture of land in *fee* under the section of the Internal Revenue Act which we are considering; and that the "right, title and interest" mentioned, must be construed to mean life-interest. This will be noticed hereafter.

§ 159. **Illicit Storing.** Sections 3288-9: "No distilled spirits on which the tax has been paid shall be stored or allowed to remain on any distillery premises, under a penalty of a forfeiture of all spirits so found.

"All distilled spirits found in any cask or package containing five gallons or more, without having thereon such mark and stamp required therefor by law, shall be forfeited to the United States."

Offenses by the things: 1. Being kept on distillery premises

¹ United States v. A Distillery in West Front St., 2 Blatch. 192.

after payment of the tax; 2. Being kept in unmarked and unstamped casks, etc., containing five or more gallons.

It was lately held that stand casks used to hold liquor in small quantities drawn from the original packages, are not liable to forfeiture for want of stamp—the original packages having been duly stamped, and the stand-casks being used for retailing purposes.¹

§ 160. **Removing Spirits Unlawfully:** The full text of Sec. 3299 is as follows: “All distilled spirits found elsewhere than in a distillery or distillery warehouse, not having been removed therefrom according to law, shall be forfeited to the United States.”

The language is ambiguous, since distilled spirits may be found in this country, outside of an American distillery, which have never been in one; or, have never been in such distillery since the passage of the Act of 1868, from which this section of the Revised Statutes is drawn. The courts, however, will doubtless hold the meaning to be confined to spirits distilled in the United States since the passage of the act. The Supreme Court has passed upon this section, without making any strictures upon its phraseology. Indeed, the organ of the court, in passing upon it, was complimentary to the Act of 1868, saying, “It follows up the subject by sections of the most general nature, so framed as not to admit of any possible escape or evasion.”²

This section may be briefly analyzed as follows,

1. The thing guilty is distilled spirits.
2. The offense is the act of removing in contravention of law.³

How does the law require the moving to be done? First, the tax must be paid; secondly, a permit to remove obtained from the Internal Revenue Collector in charge of the warehouse containing the spirits, and what is termed a “withdrawal

¹ United States v. Four Stand-casks, 11 Reporter, 454, (C. C. in Pa. 1881.)

² The Distilled Spirits, 11 Wall. 356.

³ United States v. Anthony, 14

Blatchf. 92; United States v. Miller, Id. 93; United States v. Nunne-macher, 7 Bissell, 111; 278 Barrels of Distilled Spirits, 3 Cliff. 261.

entry" filed; thirdly, the spirits in casks must be gauged, stamped and branded by the proper officers.

This section is to be construed with kindred parts of the statutes on the same subject. Removal effected by means of a false and fraudulent bond "would be illegal."¹ The acceptance by the collector of a false and fraudulent bond given for the removal of distilled spirits from a bonded warehouse, will not prevent a forfeiture under the section which forfeits "distilled spirits found elsewhere than in a bonded warehouse, not having been removed therefrom according to law."² It may be added that removal from a distillery or distilling warehouse, contrary to the evidently intended meaning of Sec. 3299, would be subject to the same rule, since the law as here revised in the statute does not contain "bonded warehouse" in this section. The information against *The Distilled Spirits*, (above cited,) was based upon acts anterior in date to that of July 20, 1868, from which Sec. 3299 is drawn.³

§ 161. **False Entries, Etc.** The offenses, under Sec. 3305, are the making of false entries and omitting to keep books, with intent to defraud. They may be more fully particularized:

1. Making any false entry, with intent to mislead, defraud, or conceal from the revenue officers, any fact required to be stated.

2. Omitting to make any required entry,⁴ with intent to mislead, defraud or conceal from the revenue officers, any fact required to be stated.

3. Omitting or refusing to provide any required book, with intent to defraud.

4. Cancelling, obliterating or destroying any part of any book, with intent to defraud.

¹ *The Distilled Spirits*, 11 Wall. 356.

² *Id.*, 356; *The Whisky Cases*, 99 U. S. 594; *Boyd v. United States*, 14 Blatch. 317.

³ Conspiracy to remove distilled spirits in contravention of law has been treated in several criminal prosecutions. *United States v. Bab-*

cock, 3 Central Law Journal, 144; *United States v. Dennee*, 3 Woods, 47; *United States v. Rindskoff*, 6 Bissell, 259; *United States v. Goldberg*, 7 Bissell, 175; *United States v. Nunnemacher*, 7 Bissell, 111.

⁴ *United States v. Malone*, 8 Ben. 574; *Lewey v. United States*, 15 Blatchf. 1.

5. Permitting the cancelling, obliterating or destroying of any part of any book, with intent to defraud.

6. Failing to produce the books, or any of them, when required by any revenue officer.¹

The guilty things, to which the fraudulent acts or omissions are imputed, are—

1. The distillery and distilling apparatus.

2. The "lot or tract of land on which it [the distillery] stands."

3. "All personal property on said premises, used in the business there carried on."

The books, concerning which this section is enacted, are described in the preceding one. They must be such as the Commissioner of Internal Revenue may prescribe, and must contain, in one book or more, a true and exact entry of the kind of materials, and the quantity in pounds, bushels, or gallons purchased by him for the production of spirits, from whom and when purchased, and by what conveyance delivered at said distillery, and the amount paid therefor; the kind and quantity of fuel purchased for use in the distillery, and from whom purchased; the amount paid for ice or water for use in the distillery; the repairs placed on said distillery or distilling apparatus; the cost thereof, and by whom and when made, and the name and residence of each person employed in or about the distillery, and in what capacity employed.

And in another book he [the distiller] shall make like entry of the quantity of grain and other material used for the production of spirits; the time of day when any yeast or other composition is put into any mash or beer for the purpose of exciting fermentation; the quantity of mash in each tub, designating the same by the number of the tub; the number of dry inches, that is to say, the number of inches between the top of each tub and the surface of the mash or beer therein at the time of yeasting; the gravity and temperature of the beer at the time of yeasting, and on every day thereafter its quantity,

¹ Stockwell v. United States, 3 Cl. & F. 284, with reference to the seizure of an importer's books, when fraud has been charged.

gravity and temperature at the hour of twelve, meridian; also, of the time when any fermenting tub is emptied of ripe mash or beer; the number of gallons of spirits distilled; the number of gallons placed in the warehouse, and the proof thereof; the number of gallons sold or removed, with the proof thereof, and the name, place of business and residence of the person to whom sold.¹

Without repeating the remarks previously made about the forfeiture of "tracts of land," it may be added that the same conclusion must be reached, under this section, as under those to which those comments were applied; that is, only so much land as properly belongs to the distillery establishment can be rightfully charged with imputed guilt, and forfeited.

§ 162. Omissions From Books, and Withholding Books.

It will be observed that the real and personal property forfeitable under this section is not confined to that which is used in fraudulently making false entries, omitting required entries, obliterating entries previously made, or in withholding the books (fraudulently or not): but such personal property as is on the premises and "used in the business there carried on," and such real property as the distillery occupies. Under these circumstances, does the government acquire any *jus in re* by the fraudulent omission of the distiller to enter some of the minor matters required—the quantity of ice—the weight of a certain numbered wash-tub at 12 M. of a given day, or the dry-inch measurement?

It seems so. The legislator was the judge of what should be required; and any violation of the requirements is an offense, having been so made by statute; the offender keeps his books as a part, and a legally required part of the business he is licensed to carry on, and he may therefore be said to use the distillery and all the personal and real property connected therewith, in perpetrating the fraud. Without the establish-

¹ United States v. Singer, 15 Wall. 118; The Collector v. Beggs, 17 Id. 182; Pahlman v. The Collector, 20 Id. 189; United States v. Mason, 6 Bissell, 350; Distillery No. 28, Id.

483; Bergdoll v. Pollock, (5 Otto,) 95 U. S. 337; A Quantity of Distilled Spirits, 3 Ben. 552; United States v. 1412 Gallons of Spirits, 10 Blatchf. 428.

ment, no books of the kind would exist; and it is manifest that every fraudulent entry or omission has reference to the establishment, for it is for the purpose of promoting the success and increasing the profits of the establishment.

Congress cannot constitutionally provide that property shall be condemned as guilty by proceedings *in rem* where there is no offense to be imputed; but it can provide for such condemnations for offenses resting upon apparently unimportant facts.

In the list of offenses under this section, to the offense of *permitting*, "entries," "omissions," "obliterations," etc., may be applied the word "fraudulently," since the phrase, "permits *the same* to be done," fully warrants this interpretation. But we cannot construe "withholding the books" to mean *fraudulently* withholding the books," without violence. The mere withholding is made a misdemeanor by this section, punishable by fine and imprisonment; and therefore it is sufficient basis for proceedings *in rem*, if the property is charged with having been used by the offender in perpetration of this offense.¹

§ 163. **Doing Business After Notice of Quitting.** If a distiller, after having given notice of his intention to suspend work, carries on his business after the time he has named as the period of suspension, he shall incur the forfeitures denounced against those who carry on the business without having given the legal bonds. Section 3310.

If he has mash, wort or beer in his distillery, or in any premises connected therewith, or has any under his control with intent to distill it on the premises, after the notice time of quitting, he incurs the like forfeitures.

§ 164. **Removing Distilled Spirits from Cask Without Brand, and Removal by Night.** Distilled spirits not branded, changed from one cask to another, for sale, are forfeited. Section 3323 provides how casks and packages shall be marked and branded, and denounces the forfeiture of the unmarked or unbranded. Casks of less than ten gallons are excepted from the rule.²

¹ Heidritter v. Oil Cloth Co., XI. Reporter, 595, (C. C. in N. J., March, 1881.)

² See § 3289, R. S. It has been held not to apply to "stand casks" used to hold liquor in small quantities, drawn from original packages,

This section has been repealed so far as it relates to wholesale liquor dealer's packages filled on their premises.

The marks or brands, to be put on the cask, or package to which the distilled spirits are transferred preparatory to sale, must show the name of the gauger—time and place of inspection—proof of the spirits—particular name of such spirits as known to the trade—name and place of business of the dealer or rectifier, as the case may be; and, except where such spirits have been rectified or compounded, the name also of the distiller and the distillery where such spirits were produced, and the serial number of the original cask or package; and, where such spirits have been rectified, the name of the rectifier, and the serial number of the rectifiers stamp: let such brand be absent from a cask, and it is forfeited.¹

The absence is made "sufficient evidence for the forfeiture." A barrel of distilled spirits, libelled for having been transferred from another cask or package, for sale, and not legally branded as above required, would have a case made out against it by the simple proof of the absence of the brand, according to this section 3323. Of course such evidence might be met by counter evidence, as in all cases; but this would, under this law, make out a *prima facie* case, and the barrel would be condemned on this alone, in the absence of any exculpatory proof in defense of the accused thing.²

Removal of distilled spirits by night forfeits them, and also the horse, vehicle, boat or other conveyance used in the removal, when the spirits are in casks or packages of more than ten gallons and removed from premises where they may have been distilled, redistilled, rectified, compounded, manufactured or stored. Section 3323.

The connection here, of the forfeitable things with the removal by night, is too apparent to need the slightest elucidation. Not only the liquor but the horse and wagon are used for contravening the law.

etc. United States v. Four Stand Casks, XI. Reporter, 454.

¹ But, see United States v. 200 Bar-

rels of Whisky, (5 Otto,) 95 U. S. 571.

² Hartman v. Bean, 99 U. S. 393, with reference to R. S., § 3309.

In more than one of the foregoing sections, occur the words, "knowingly," "willfully," etc., which have received exposition from the Supreme Court,¹ to this effect: There is presumption of knowledge, which may be overcome by evidence; doing an unlawful act "knowingly and willfully," implies evil intent.

§ 165. **Bottling Fermented Liquors Unstamped.** Bottling fermented liquor from any unstamped hogshead or other vessel; or drawing it thence for the purpose of bottling; or carrying on, (or attempting to do so,) the business of bottling fermented liquor in any place where it is made or premises communicating therewith, or in any warehouse, forfeits the property used in such bottling business. Section 3354.

The owner, agent or superintendent of any brewery, vessels or utensils used in making fermented liquors, who evades the payment of the required tax or attempts to do so, or fraudulently neglects or refuses to make the required entries and reports, or to do anything legally required of him in conducting his business, or makes a false entry, or causes such to be made, forfeits for every such offense, the liquors made by or for him, and all the vessels, utensils and apparatus used in making such liquors.² We must consider this forfeiture confined to the liquors made by or for him, and the implements used in the making of those particular liquors connected with which the offense of failing to make the required entries, or some other herein, was committed. It does not appear that other liquors "made by or for him," with the use of these implements, but not connected with any one of the several offenses mentioned in this section, would be properly subject to seizure and forfeiture.

§ 166. **Possessing Fermented Liquors With Tax Unpaid.** Possession of fermented liquor, after removal from the warehouse without a permit, and without payment of the tax, "shall render such liquor liable to seizure wherever found, and to forfeiture."³ Absence of stamp is made notice of non-payment of the tax, and evidence thereof. In other words, persons in possession of such liquors, are deemed to be possessors with

¹ Felton v. United States, 6 Otto, 699.

² R. S., 3340.

³ R. S., 3352.

notice of the fact that the tax has not been paid. And it is such evidence of the non-payment as to throw the burden of proof upon the claimant.

The exact language of the statute, "ownership or possession by any person, of any fermented liquor * * * upon which the tax required has not been paid * * * shall render such liquor liable to * * * forfeiture," should be construed differently from its literal signification, if it is to stand as law. It is not the ownership, but the non-payment which forfeits the liquor. Can we justly construe it differently from its literal expression? It makes nonsense as it stands, since things are never forfeitable as guilty by reason of ownership, as are things hostile confiscable by reason of their ownership. We must make sense of it, if we can. Construing it *in pari materia* with other provisions of the Internal Revenue laws,¹ constituting a system, it would seem that Congress meant that possession of such liquors with knowledge that the government had been defrauded of the tax, (the evidence of which the possessor has in the absence of the mark,) shall forfeit them. In other words, the holding of them, under such circumstances, being in contravention of law, shall render them forfeit; the guilt of the offending holder being imputed to the thing held. If, however, the legislator has really said something different, we have no right to supply what was meant. Property is never deemed *guilty* from the character of its owner.

§ 167. **Transporting Under False Brand.** There is a section which should be noticed in this connection, though found removed from the foregoing provisions, by which, whenever any person ships, transports, or removes any spiritous or fermented liquors or wines, under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks and packages containing the wines or liquors, or causes such act to be done, he shall forfeit the property.²

¹ The Distilled Spirits, 11 Wall. 356.

² U. S. Rev. Stat. 3449.

CHAPTER XVIII.

INTERNAL REVENUE FORFEITURES—CONTINUED.

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§ 168. **Forfeiture for Purchasing, Etc., Tobacco, Etc., With Tax Unpaid.** "Every person who purchases, or receives for sale, any manufactured tobacco or snuff from any manufacturer who has not paid the special tax, shall be liable for each offense to a penalty of one hundred dollars, and to a forfeiture of all the articles so purchased or received, or of the full value thereof." R. Stat. Sec. 3367.¹

The personal offenses are:

1. Purchasing manufactured tobacco, or snuff, from a manufacturer who has not paid the special tax.
2. Receiving for sale manufactured tobacco or snuff from a manufacturer who has not paid the special tax.

The penalties are alternate, in case of a personal prosecution under this section:

1. One hundred dollars and the goods by way of fine; or,
2. One hundred dollars and the value of the goods.

If an action *in rem* be brought against the tobacco or snuff, the guilt imputed to the thing would result from the offense of having been purchased or received in contravention of law.

¹ Burgess v. Salmon, (7 Otto) 97 U. S. 381

The pecuniary forfeiture of one hundred dollars could not be included in such action.¹

§ 169. **Omitting the Required Stamp.** Tobacco or snuff of any description is forfeited for the offenses of fraudulently omitting the required stamp, by one who manufactures it for another on commission or shares; also, in case of fraud on the part of the person furnishing the materials for the manufacture, or any collusion between the two—any of said acts being with intent to defraud the government of its revenue. R. S. 3370.

§ 170. **Fraudulent Moving, Selling, Entering, Stamping, Etc.**

Being moved otherwise than as provided by law;—

Being sold unstamped, unrelieved of the special tax or unbonded as legally required;—

Being falsely and fraudulently entered in “entries of manufactures, or sales;” or

Being falsely or fraudulently stamped—by the manufacturer, renders snuff or tobacco forfeit.

Being falsely or fraudulently entered, in the entry of the purchase or sales of leaf-tobacco, tobacco stems, or other materials, renders such goods forfeit. **The forfeiture** of such goods, as well as that of tobacco and snuff, under this section, (3372, R. S.) extends not only to manufactured articles, but to the raw material, that which is partly manufactured, and to all the machinery, tools, implements, apparatus, fixtures, boxes and barrels, and all other materials which may be found in the manufacturer’s possession, in his manufactory or elsewhere.²

The absense of the required stamp on any package of snuff or tobacco is notice to all persons of the non-payment of the tax;³ is made, by statute, evidence of the non-payment; and the unstamped thing proceeded against is forfeited for being without the stamp. R. S. 3373.⁴

¹ The District Attorney is not obliged to elect between two sections, when the *res* is charged as forfeited under both. 800 Caddies of Tobacco, 2 Bond, 305.

² See Lillianthal’s Tobacco, (7 Otto) 97 U. S. 237; Wilcox’s Case, 12 C. Cls. 495; Pace v. Burgess, Col-

lector, 92 U. S. 372.

³ R. S. § 3376. Possession of parts of stamps previously used on snuff jars does not constitute an offense, though indicating a fraudulent purpose. United States v. Loup, 1 McCrary, 168.

⁴ Jones v. Blackwell, 100 U. S. 599.

§ 171. **Peddler's Refusal to Show License.** A peddler of tobacco refusing to exhibit his stamped certificate received by him from the collector, when required to show it by any officer of internal revenue, may have his horse or mule, wagon and contents, or pack, bundle or basket, seized: and hereupon follow proceedings very curious. R. S. 3383.

The collector gives the peddler ten days notice "to show cause" to him why the thing seized should not be forfeited. And this notice need not be served personally upon the peddler, but ten days notice in any newspaper of the district, will answer as well; and that published notice is not to "all persons," but to the peddler.

But all this is in mitigation of the usual rigor of the law in case of seizures for condemnation, since it is really a check-rein upon the seizing officer; for he cannot take proceedings for the forfeiture of the goods 'under the general provisions of the internal revenue laws relating to forfeitures,' without first giving the offender this novel chance of showing cause why he should not so proceed at all.

Who is to be the judicial determiner of the sufficiency of the cause shown, the legislator does not inform us.

§ 172. **Several Offenses: Forfeiture of Cigars.** A box of cigars, for being unstamped, is forfeited, if sold, offered for sale or kept for sale. R. S. 3398.

Cigars manufactured on shares—one partner furnishing the material and another manufacturing; and cigars made from material to be paid for in cigars manufactured, must be stamped before removal from the manufactory. In case of fraud, or collusion with intent to defraud, on the part of either the contracting parties, "such material and cigars shall be forfeited to the United States." R. S. 3399.

There shall be forfeited—

1. The estate and interest of the manufacturer in his factory or building.

2. His lot or tract of ground on which it is located, and all appurtenances thereunto belonging.

3. His raw material, and manufactured or partly manufactured tobacco and cigars.

4. His machinery, tools, implements, apparatus, fixtures, boxes, barrels and all other materials which shall be found in his possession or in his manufactory and used in the business.

The forfeitures are for the offenses of the manufacturer in—

1. Selling or removing cigars without payment of the special tax as a cigar-manufacturer.

2. Selling or removing them without having given the required bond as a cigar-manufacturer.

3. Selling or removing them without having affixed the stamps showing the tax paid.

4. Making false or fraudulent entries of the manufacture or sale of them.

5. Affixing any false or fraudulent stamp to them.

These forfeitures are declared to be in addition to the penalties elsewhere provided for the above mentioned offenses. Rev. Stat. § 3400.

Cigars purchased, or received for sale, are declared forfeitable by section 3405, under similar provision as relates to tobacco and snuff by section 3367.

The penal provisions of the Title xxxv. of the Revised Statutes, proscribed for the manufacturers of cigars, are extended, by section 3402, to importers and owners of imported cigars.

§ 173. **For Several Offenses: Forfeiture of Medicines, Cosmetics, Etc.** Medicines, medicinal preparations, perfumery and cosmetics, of certain descriptions, (R. S. 3437, Schedule A.,) are liable to forfeiture, if the stamps be removed by the manufacturer, or if he causes or suffers such removal. Such articles, if wrapped in a stamped cover previously used; or if they have a previously-used stamp attached, are also liable. The removal of stamps, or the second use of them, must be "with the intent to evade the stamp duties." (§ 3431.) Selling, offering for sale, etc., hiding or removing, etc., before the paying of the duty and the affixing of the stamp, of such articles, by the manufacturer, also incurs forfeiture. (§ 3432.) And such articles, if offered for sale, whether they have been imported or are of domestic manufacture, shall be subject to forfeiture as though the seller were the manufacturer. (§ 3435.) To use the language of this section, "Every person who offers or exposes

for sale, any of the articles * * * shall be deemed the manufacturer thereof."

Some more general provisions of the Internal Revenue Laws; provisions applicable to several objects, including some of those which have already been particularly noticed, and which the law particularizes, will now be considered.

§ 174. **Concealing any Taxable Commodities to Avoid Tax.** Any goods or commodities; any material,¹ utensils or vessels used, or meant for use in making taxable goods and commodities, if fraudulently removed or concealed to avoid the tax, shall be forfeited. Every cask, vessel, package, etc., which has contained such forfeitable commodities; every boat, carriage, horse, etc., used in such removal, concealment, etc., shall be forfeited. § 3450.²

In the section last cited, after providing that "all boilers, stills, tools, implements," (on to quite a list,) forfeited under any provisions of Title xxxv. of the Revised Statutes, "and all condemned material, together with any engine or other material connected therewith," [whether condemned or not?] and all empty barrels, etc., "shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law," Congress goes on to say, "All spirits or spirituous liquors which may be forfeited under the provisions of this Title, [xxxv.] unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue, as the Secretary of the Treasury may direct." Here is an instance of a sale not judicial, by the government as judgment-owner, through an agent.

§ 175. **False Bond, Permit, Entry, Etc.** Forfeiture by section 3451, is made the fate of all property relative to which a bond, permit or entry or other document required by the Internal Revenue Laws, or regulations made pursuant thereto, is

¹ Raw material intended for the fraudulent manufacture of tobacco, may be seized for forfeiture wher-

ever found. 16 Hhds. Tobacco, 2 Bond, 137.

² United States v. 100 Barrels of Spirits, 2 Abb. U. S. Rep. (305.)

falsely made, procured to be made, advised to be made, or aided to be made, by the owner of the property.

It would not matter, under this provision, whether the property imputedly guilty, be movable or immovable. The forfeitures under section 3453, however, are limited to movables: "All goods, wares and merchandise, articles or objects, on which taxes are imposed," found with somebody who holds them for the purpose of fraudulent sale or removal to avoid the tax * * * shall be forfeited. Raw material meant to be fraudulently manufactured, and the tools, etc., in the factory or inclosure, shall be forfeited. Then it is added, "The proceedings to enforce such forfeitures shall be in the nature of a proceeding *in rem* in the Circuit or District Court of the United States for the district where such seizure is made."

Why say, "*in the nature of a proceeding in rem?*" Is not a suit against merchandise a proceeding *in rem*, and not merely *in the nature of one*? What did the legislature mean by saying *in the nature of*? We all feel quite sure, that a suit against Richard Roe is a suit *in personam* and not merely *in the nature of a suit in personam*. We feel equally sure that a proceeding against a cask of whisky, is really a proceeding against a cask of whisky, and not merely a proceeding *in the nature of* a proceeding against a cask of whisky. A suit against any one of the many things mentioned in this section, (3453,) is a suit against that thing, and not merely a suit *in the nature of* such a suit. The redundant words are not objectionable for their redundancy only, but far more on account of their tendency to mislead.

Then, why did the legislator provide especially that the seizures which the collector or deputy collector of the proper district, or such other collector or deputy as might be specially authorized by the Commissioner of Internal Revenue, were to make, should be followed by proceedings in the District or Circuit Court having jurisdiction of the place of seizure? Is not all this a matter of course? Did he suppose that any power but a court could declare the forfeiture or decree the *status* of the thing? Did he think it essential to say that the action must be brought in some Federal court? And since he did not

choose to decide between the Circuit and District Court, was there need of mentioning the court at all? Is it possible that he has ever thought, in providing for all the heretofore mentioned forfeitures, that any executive officer of the revenue could declare one, without the interposition of the judiciary?¹

§ 176. **Fraudulently Disposing of Empty Stamped Packages.** The fraudulent disposition of empty stamped packages, (as more fully set forth in section 3455, R. S.) renders them and their contents forfeit to the United States. There is a general provision in section 3456, for the forfeiture of liquors, cigars, etc., by manufacturers for offenses, both of omission and commission, under the various provisions of Title, xxxv. R. S.² And it is added, in the next section,³ that "in every case where *any* goods or commodities are forfeited under *any* internal revenue law, all casks, vessels, cases or other packages whatsoever, containing, or which shall have contained such goods or commodities, respectively, shall be forfeited."

§ 177. **General Provisions.** There is authority given to the revenue officers, by section 3459, to sell perishable seized goods, in certain cases when the owner has refused to bond them; and to have the proceeds prosecuted in court, by the action *in rem*.

Where goods are seized by the revenue officers, and appraised by appointees of the Internal Revenue Collector or his deputy, at not more than five hundred dollars, they are to be sold by order of the collector, whether perishable or not, unless some claimant come forward and give a bond obligating himself, with his surety, to pay the costs of defending his seized property in court, in addition to the loss of it, in case he should not make good his claim to the thing and his defense of the thing—if

¹ United States v. One Still, 5 Blatch. 403; United States v. 36 Barrels Highwines, 7 Blatch. 468; United States v. 92 Barrels Spirits, 8 Blatch. 480; United States v. 33 Barrels Spirits, 1 Abb. U. S. 311; United States v. 17 Barrels, 3 Dill. 285; The Distilled Spirits, 11 Wall. 356; The Whisky Cases, (9 Otto,) 99 U. S. 594; Thracher v. United States,

15 Blatchf. 15.

² United States v. McKin & Co., 2 Am. L., T. U. S. 153; The Whisky Cases, (9 Otto,) 99 U. S. 594; United States v. Certain Distilled Spirits, 3 Am. L., T. U. S. 10; United States v. 200 Barrels of Whisky, 2 Woods, 54; United States v. 800 Caddies of Tobacco, 2 Bond, 305.

³ § 3457.

section 3460 can stand. And it is provided in the following section, that the owner's right to apply to the Secretary of the Treasury for the remission of such forfeiture shall be prescribed in one year from the date of the sale. The Secretary *may* grant remission, and a restoration of the proceeds of the sale, if the applicant prove that he was out of the United States when his property was seized and sold, or circumstanced so as not to know of the seizure; and he must satisfactorily *prove his innocence* of fraud or negligence. Could any provision be imagined more repugnant to the spirit of our institutions?

Then, carrying out the idea that the Treasury Department is so clothed with judicial powers as to include a court within that executive department, the section closes by providing that if no appeal to the Secretary be made within the year, he shall "cause the proceeds of the sale of the said property to be distributed according to law, as in the case of goods, wares or merchandise condemned and sold pursuant to the decree of a competent court."

CHAPTER XIX.

THE FORFEITURE OF LAND AS A GUILTY THING.

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§ 178. **Guilty Land Not Different From Guilty Chattels.** The forfeiture of real estate as a guilty thing, by proceedings *in rem*, is repeatedly provided for in the Internal Revenue Laws. It becomes forfeit for being used for the purposes of a distillery when the required bond has not been given, (sections 3260, 3281;) for being leased for such purpose (section 3281,) for being used in the business when frauds are perpetrated by false entries, reports, etc., (section, 3305.) And there is a like provision for forfeiting land for the fraudulent manufacture, removal, etc., of cigars, section 3400. The sections referring to real estate forfeitures, with analyses of them, have been set forth in a previous chapter. The mere mention of them is sufficient for the present purpose.

Lands are forfeited for use in contravention of law. The violation of law by the use of land is, in some instances, by the owner, but not necessarily so. It is not the owner's guilt, but the land's guilt by its use, that renders it forfeit. There is an offending person and an offending thing, but the proceedings are against the latter.

Let such proceedings not be confounded with those authorized by other sections of these laws against persons, with forfeitures following as consequences of personal conviction. The latter

are strictly personal actions; and if the forfeiture of lands were made to result from conviction and sentence, it would be just like forfeiture of money under various personal convictions, by way of fine, as the revenue laws now stand.

Nor let such proceedings be confounded with the internal revenue distrainments upon lands for taxes, and suits against them as *indebted* things; since the *actio in rem* to condemn for guilt, is very different from the *actio in rem* to enforce a lien.

There is no difference between the constitutional right to forfeit guilty land, and the right to forfeit guilty chattels, for having been used in the committal of an offense. There is nothing sacred in land. Under the feudal system, when land was derived from the crown, and held for doing service to the sovereign, and deemed inalienable, a sort of respect for it grew up which has been transmitted to us in a diluted potion; but lands in the United States are held by no such tenure, and are bought and sold like personal property, subject to such rules as are necessary to afford evidence of transfer.

§ 179. **Is There any Constitutional Restriction?** The case of the *United States v. A Distillery*, in West Front street,¹ in which all the right, title and interest of a building and the ground on which it stood were libelled for having been employed for carrying on the business of a distiller without the payment of the required tax, with intent to defraud the government, gave rise to a claim and answer, on the part of one Plunkett, in which he set up that he was the owner of the real estate in fee simple, and that the fee simple could not be forfeited because protected by the article of the constitution which provides: "Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted." He contended, indeed, that as there was no prosecution against him personally, the forfeiture of his real estate by the *actio in rem* was equivalent to its forfeiture by bill of attainder, which the constitution had forbidden. He argued that since attainder cannot work forfeiture beyond the life of

¹ *United States v. A Distillery*, 2 Blatch. 192.

the traitor, the spirit of the constitution would preclude a greater forfeiture for a mere misdemeanor. Plunkett had never been attainted or blackened by bill. No act of Congress had ever been passed containing his name or arbitrarily fixing the *status* of his property. Congress, doubtless, might make attainder a penalty for crime, resulting from conviction, since it has powers to provide for the punishment of crime which are not limited in this particular; but there is no such enactment. Congress could no more take Plunkett's land by bill than it could blacken him by bill; nor could it make forfeiture a result of attainder after personal conviction. The act under which his real estate fell was a general law, under the inhibitions of which he voluntarily placed his immovable property.

It was the Internal Revenue Act of 1868, under which his land was libelled—Sec. 44 of which provides that “all the right, title and interest of every person in any premises used for ingress or egress to or from” a distillery carried on without the giving of the required bond by the distiller, etc., “who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.” R. S. 3281.

§ 180. **Right, Title and Interest.** The right, title and interest of Plunkett proved to be the full title in fee simple, yet the idea that the full title could not be condemned was urged to the court.

If “right title and interest” means less than the owner's entire right, there is serious fault in the language employed; yet, in a class of cases *in rem* of a very different character from those against *guilty* things, it has sometimes been held (though not invariably,) that the terms “right, title and interest,” mean less than they express; that though all the right, title and interest of a fee simple owner might be condemned, there yet remained an interest for his heirs somehow to obtain. That the court was right, in this case of *The United States v. A Distillery*, in condemning the fee, seems clear beyond dispute, notwithstanding those exceptional cases.

If in any class of cases *in rem*, there were constitutional limitation to land condemnation with regard to duration of

title, it would more plausibly apply to proceedings, against things *guilty*, than to things *hostile* or to things *indebted*. The first class named has reference to an offending person; the other two have not. The first class named is said to be subject to "forfeiture," (the term used in the constitutional limitation,) while, according to the nomenclature adopted by all writers upon the *jus gentium*, the word "confiscation" is applied with reference to the second class of things mentioned, while neither term would be appropriate to the third.

If children could be considered heirs to living fathers so as to have present rights to the fee, then the term "life, title and interest" might more plausibly be confined to the time in which the owner could personally occupy it—that is, the period of his life. Although there are some ill-considered opinions in the books which seem to recognize present rights in "the heirs expectant," yet it will not seriously be contended that a fee simple owner may not alienate his property in any alienable way—by sale, exchange, duration, *forfeiture*, etc.

There is certainly more plausibility in applying life-time limitation to the forfeiture of offending things, than to either of the other classes. The claimant Plunkett might have contended that as the constitution must be considered as interwoven with all statutes, the article on which he relied should be treated as a *proviso* attached to the statute. And as the statute had reference to offenses, and the forfeiture was for an offense, the appendage of the constitutional article to the statute as a *proviso* would have been much less incongruous than its attachment to a law for confiscating enemy's property, so that the two might be construed together.

It is true that this Internal Revenue statute has no reference to treason whatever, (as the article of the constitution has,) but it really has reference to an *offense*, while confiscation of enemy property have no reference whatever to any crime or offense from treason down to the slightest misdemeanor.

The argument of the complainant Plunkett, that if the constitution saved real estate from such forfeiture as would transfer the fee, in a personal action for treason, its spirit would not allow the fee to be condemned in a different sort of action, for

a less offense, may seem weak enough; but it is strong, compared with the argument that this article of the constitution on criminal law and personal trials can have bearing upon a proceeding, (authorized by a municipal statute but deriving its authority from the law of nations as incorporated into our constitution,) instituted against a *hostile* thing, so as to limit the period in which a confiscated thing should remain confiscated.

§ 181. **Only such Part of a Tract of Land as has been Used in Contravention of Law, can be Deemed an Offending Thing.** Is there any authority for forfeiting "a tract of land," beyond the portion used in committing offense, under the sections of the Internal Revenue Laws, which we have cited? In other words, can such forfeiture be rightfully decreed? Have not these sections been extended beyond the limits of the law-making power? If only one acre of a tract of land containing a hundred acres, is used in contravention of law, only that acre can be rightfully condemned.

The authorities all hold that things *guilty* can only be condemned for wrong done in, with, or by them, with the exception of some few decisions which would seem to take a contrary view without being supported by any argumentative refutation of the general doctrine as it has always existed in England and in this country, and in the civil law countries from which the whole system of *proceedings in rem* has been devised.

These exceptional decisions are found in a class of cases where the legal student would never have thought of seeking any light relative to the forfeiture of offending things. They are found in cases where the proceedings were not against guilty property at all, but against enemy property which had obtained its status from the hostile character of its owner, and not by reason of anything done in, with, or by it.

If a plantation may be forfeited as an *offending thing* because its owner, (be he citizen or foreigner,) belongs to a certain description of enemy, may not "a tract of land" consisting of several hundred acres, be lawfully forfeited as an *offending thing* because its owner belongs to that set of men who lease land for illicit distilling? It would have been quite as

much in the power of Congress to have made ownership an *offense* in the one case as in the other. But the sections of the Internal Revenue Laws which authorize the forfeiture of "tracts of land," do not go thus far. They make the offense consist, not in the character of the lessor who leases land for illicit distilling, (which would have been indeed absurd,) but in the wrongful act of leasing the tract for such unlawful purpose, or suffering or consenting to such use. Now, if the whole of a large tract were so leased or given, and all illicitly used, doubtless the whole would be forfeitable. But if only a comparatively small portion should be so used, leased for such use, or allowed to be so used, could the whole tract be forfeited for this?

It is certain that, in none of the confiscation cases under the Act of 1862, a single acre of land was ever used, leased for use, etc., or life interest in such land was used, etc., for the commission of the personal, municipal *offense*—(of which, according to the treason hypothesis, its owners were charged as guilty:) *i. e.*, the "offense" of being an officer in the confederate army, a member of the confederate congress, etc., etc. If, when not a single acre has offended, a whole plantation may be condemned as an *offending thing*, under that Confiscation Act, why may not as much be condemned when a single acre has offended, under a revenue law?

Mr. Justice CLIFFORD patiently went over the old ground to show how things are deemed guilty and primarily responsible, in a comparatively late case, when deciding upon a proceeding against a distillery and other property real and personal, based upon some of the sections above discussed.¹ The claimant was not the distiller, but he was the owner of the distillery and the land on which it was situated, and "the gist of the proceeding consisted in the alleged fraudulent acts and omissions of the lessee and occupant of the distillery, or his agent and employés."

If the owner, "knowingly suffers and permits his land to be used as a site for a distillery," the court said, "the law places

¹ Dobbins' Distillery, 6 Otto, (96 U. S.) 395.

him on the same footing as if he were the distiller; * * * and if fraud is shown in such a case, the land is forfeited, just as if the distiller were the owner." Then, after quoting Judge STORY, and citing the *Palmyra* and *Malek Adhel*¹ to show the doctrine of property-guilt, they say further: "Beyond all doubt, the act of Congress in question attaches the offense to the distillery and the real and personal property connected with the same * * * without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery." Then, again referring to Judge STORY and to Chief Justice MARSHALL to show the fiction of the guilt of things, and making no distinction whatever between personal and real property in this respect, the court, through CLIFFORD, J., continued: "Apply that rule to the case before the court, and it follows that the distillery, and the real and personal property used in connection with the same, must be considered as affected by the unlawful doings and omissions of the lessee and occupant of the property as a distillery, subject to the rules and regulations prescribed by Congress. * * * Fraud is not imputed to the owner of the premises; but the evidence and the verdict of the jury warrant the conclusion that the frauds charged in the information were satisfactorily proved, from which it follows that the decree of condemnation is correct, if it be true, as heretofore explained, that it was the property and not the claimant that was put upon trial under the pleadings." And the condemnation was affirmed.

§ 182. **Forfeiture of Land Worth More than \$50,000 held by a Religious or Charitable Association in the Territories.** It is provided, in section 1890 of the Revised Statutes, that, "No corporation or association for religious or charitable purposes shall acquire or hold real estate in any territory, during the existence of the territorial government, of a greater value than fifty thousand dollars; and all real estate acquired or held by such corporation or association contrary hereto shall be forfeited

¹ The *Palmyra*, 12 Wheat. 1; The Brig *Malek Adhel*, 2 How. 210.

and escheat to the United States; but existing vested rights in real estate shall not be impaired by the provisions of this section."

It is enacted, in the following section: "The constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized as elsewhere within the United States."

Congress is the sole legislature for the territories; for, where there are territorial legislatures, they derive their power to enact local laws from Congress, and that power may be taken away from them at the pleasure of Congress. As the sole legislature, Congress has precisely the same power over territories which it and a State legislature together have over a State. Legislation concerning corporations, under State governments, is not more free within a State, than it is, under the Federal government, over a territory.

Both, however, are under the paramount law, the constitution of the United States. Section 1891, above copied, cannot possibly extend the force of the constitution over the territories to any greater degree than it possessed before the enactment of that provision; but the extension of all the applicable laws of the United States, is very important.

Without discussing the wisdom, or even the constitutionality of the inhibition with regard to the amount in value of land which a religious or charitable association may not possess, let us briefly analyse this law of forfeiture.

The thing to be seized and condemned is territorial real estate, worth more than \$50,000.

The offense of the thing is being acquired or held by a religious or charitable association, to the amount forbidden.

The *jus in re* arises from the contravention of law.

The artificial owner is not necessarily located in the territory, but may have domicile in any part of the United States, or elsewhere.

It will be seen by the reader, that the phrase "escheat to the United States," is wholly unnecessary in the section quoted, and that it adds nothing to the meaning of the previous words,

“shall be forfeited.” The title which the government would obtain, in case of forfeiture duly declared, would be the new one arising from the forfeiture: not the charitable society’s title by escheat.

CHAPTER XX.

FORFEITURES UNDER THE COLLECTION LAWS.

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§ 183. **Not Entering Merchandise on Manifest and Reporting Imported Spirits and Wines.** Distilled spirits and wines imported are forfeited, if not reported by the master of the vessel in which they are brought, within forty-eight hours of their arrival, to the surveyor or inspector, with account of the foreign port from which he last sailed; the name, tonnage and nationality of his vessel; the quantity, kind, number of casks or packages, etc., with marks and numbers, of spirits and wines on board the vessel, designating also what quantity and kind are kept as sea stores.¹

Sea stores are forfeited, if any are found on board of a vessel which have not been entered upon the manifest; or if landed without the proper permit from the collector and naval officer, or the collector alone, where there is no naval officer.² "Whenever any article, subject to duty, is found in the baggage of any person arriving within the United States, which was not, at the time of making entry for such baggage, mentioned to the collector before whom such entry was made, by the person making entry, such article shall be forfeited."³ * * * It would be

¹ Rev. Stat., § 2775; Four Packages v. United States, (7 Otto,) 97 U. S. 404.

² Rev. Stat., § 2797.

³ Rev. Stat., § 2802.

too late to prevent forfeiture, should the passenger pay duty before seizure and have the dutiable articles entered; so the Supreme Court have held,¹ on the ground that the forfeiture attached at the time of the offense, and subsequent payment of duty, and entry, could not purge the forfeiture, though occurring before seizure.

Merchandise imported, belonging to, or consigned to the officers or crew of the vessel, (or any of them,) is forfeited if not duly entered upon the manifest.² Loss of the manifest, and the fact that no part of the cargo without proper manifest was unshipped, are, by the following section, (2810,) made evidence sufficient to show that no forfeiture attached under this section, in any given case.

"If any merchandise, of which entry has been made in the office of a collector, is not invoiced according to the actual cost thereof at the place of exportation, with design to evade payment of duty, all such merchandise, or the value thereof, to be recovered of the person making entry, shall be forfeited."³ The latter clause of this section may be thus expressed: all such merchandise, (or the value thereof, to be recovered of the person making entry,) shall be forfeited.

It will be observed that, to incur forfeiture, the goods must be: (1.) Entered in the collector's office. (2.) Not invoiced at the cost at the export market. (3.) Fraudulently underestimated. Design to defraud, without the execution of the design, or an attempt to do so, would not affect the merchandise.⁴ It is necessary to aver in the libel that the valuation was below cost at the place of exportation.⁵

¹ *The Robert Edwards*, 6 Wheat. 187.

² Rev. Stat., § 2809; *United States v. 26 Diamond Rings*, 1 Sprague, 294; *United States v. Fairclough*, 4 Wash. C. C. 398; *United States v. 10,000 Cigars*, 2 Curtis, 436; *Lewey v. United States*, 15 Blatchf. 1; *United States v. Certain Cigars*, 1 Woods, 306; *The Steamship Missouri*, 3 Ben. 508; *The Steamship Missouri*, 4 Ben. 410; *The Steamship Missouri*, 9 Blatch.

433; *The Queen*, 4 Ben. 237; *The Stadacona*, 14 Int. Rev. Rec. 147.

³ Rev. Stat., § 2839; *Caldwell v. United States*, 8 How. 366; *United States v. 67 Packages*, 17 How. 85; *United States v. One Package*, Id. 97; *United States v. One Case of Clocks*, Id. 99; *Alfonso v. United States*, 2 Story, 421.

⁴ *United States v. Riddle*, 5 Cr. 311.

⁵ 78 Cases of Books, 2 Bond, 271.

Where a libel alleged that goods were invoiced at a less sum than the actual cost at the place of exportation, it was held that there could be no inquiry as to their value at the port of exportation.¹ But the Supreme Court has held that such inquiry may be made, if the libel charge, under other revenue acts, that there was fraudulent undervaluation, not that they were valued below the actual cost, (for under the latter allegation, the price paid by the shipper would be the only question;) and, to prove this, the libellant may give in evidence the official appraisement made after the arrival of the goods, and the estimates of experienced persons, and invoices of like shipments of the value at the place of exportation.² The forfeiture, under the section we are now considering, is for valuation below the actual "cost," and must be confined to the articles of merchandise undervalued, and could not be extended to the whole invoice.³ In Buckley's case, the whole invoice was condemned, though only certain articles were undervalued, but on counts of the libel based upon other provisions than the 66th section of the Act of March 2, 1799, from which section 2839 of the Revised Statutes is copied. In this case, the Supreme Court took occasion to overrule a point of a former decision,⁴ that the information should show that the fraudulent undervaluation was detected by an appraisement directed by the collector.

By the 66th section of Act, March 2, 1799, the collector was authorized, in case he suspected fraud in the invoice prices, to seize the goods and detain them for examination, as remarked in *Clifton v. United States*, above cited. In that case it was held that if the claimant withheld the evidence of his transactions with the parties abroad from whom he purchased the goods, the jury were at liberty to presume such evidence would have operated unfavorably on his case, if produced. But *cui bono*? What does it matter what they might presume would have been the effect of any evidence not produced? If the

¹ *United States v. 150 Crates of Earthenware*, 3 Wheat. 232.

² *Buckley, Claimant of Bales of Cloth v. United States*, 4 How. 251.

³ *Id.*, 260; *Clifton, Claimant of*

Cases of Cloth v. United States, 4 How. 242.

⁴ *Wood v. The United States*, 16 Pet. 342.

libellant, in any case, has so far proved his allegations as to throw the burden of proof upon the claimant's property, the jury may go against the latter in case he withholds his necessary exculpatory proof: is the rule in Clifton's case to go further? The libellant had called upon Clifton to produce his books and the charges of the payment of freight upon the cloth, but does not seem to have interrogated the latter and to have had the interrogatories taken *pro confesso*. Facts within the knowledge of the claimant should have been disclosed, if the libellant had made out a *prima facie* case. If we are to understand that the government's case was not made out by the evidence without counting with it the further evidence which the claimant withheld, we must dissent from the reasoning. If a sufficient case was made out without it, the cloth was justly condemned, though the claimant might possibly have saved his case by offering the testimony which he withheld.

Entering goods by a false denomination, subjects them to forfeiture.¹

§ 184. **Does Retroaction Depend Upon Election Between Two Remedies?** A case arose under the 66th section of the Act of March 2, 1799, (which is almost *verbatim* that of Rev. Stat. 2839,) in which the Supreme Court held that the forfeiture did not retroact to the commission of the offense but only to the time when the government elected to proceed to have the forfeiture decreed rather than to sue for the value of the fraudulently invoiced goods, by action *in personam*;² that is, to the seizure.

The alternate remedy is thus expressed: "All such merchandise, or the value thereof to be recovered of the person making the entry, shall be forfeited;" *i. e.*, the merchandise shall be forfeited, or the value of it may be recovered of the person

¹ 250 Barrels of Molasses, 1 Chase, 502; Six Packages of Goods, 6 Wheat, 520; 85 Hogsheads of Sugar, 7 Pet. 404; 84 Boxes of Sugar, Id. 453; Bollinger's Champagne, 3 Wall. 560; 1 Curt. 276; 9 Packages of Linen, 1 Paine, 129; 85 Hogsheads of Sugar (Barlow Claimant) 2 Id. 54; 10 Cases

of Shawls, 2 Id. 162; Wright v. United States, 2 Id. 184; 4 Cases of Printed Merinoes, 2 Id. 200; Cargo of Sugar, 3 Saw. 46; United States v. Bettilini, 1 Woods, 654; The Margaret Yates, 22 Vt. 663.

² Caldwell v. United States, 8 How. 366.

making the entry. Who is to decide which remedy to select? The government, to be sure. Can any one doubt that the government may at any time, before the action shall have been prescribed, proceed either *in rem* or *in personam*? But if the owner may sell and convey an indefeasible title before the government shall have acted, he really makes the election. He determines whether the goods shall ever be condemned or not. And if the person who made the false entry is living beyond the jurisdiction of our courts, or if he is insolvent, or if the owner knows from any cause that the government's only chance is against the goods, he would be quite sure to sell. He would purge the forfeiture by sale, pocket the money, and his vendee would shield himself as an innocent purchaser without notice.

The Circuit Judge, (Eastern District of Pennsylvania,) had refused to charge the jury, "That if the goods seized had been fairly and *bona fide* purchased by the claimants, without any knowledge of their being liable to seizure on the part of the United States * * * the United States cannot recover under the 66th section, even though the goods had been fraudulently or falsely invoiced or entered, provided the claimants were in no way parties thereto;" and "that even though the goods in question had been invoiced at less than the actual cost thereof at the place of exportation, with design to evade the duties thereon, the United States had no title in the goods until they made their election either to recover the goods themselves or the value thereof; and that any rights in said goods acquired *bona fide* by third persons in the meantime, are protected against the right of forfeiture under this section."

To either request the Circuit Court said, "This is not the law." To the first: "If the goods were fraudulently entered, it is no matter in whose possession they were seized; the forfeiture took place when the fraud, if any, was committed, and the seller could convey no title to the purchaser." To the second: "The title of the United States vested at the time the fraud, if any, was committed, and the law authorized them to seize the goods wherever they might be found."

Both these charges were overruled by the Supreme Court, seemingly to the disturbance of the symmetry of the system

under discussion. Laying down broadly the general doctrine that forfeiture relates backwards to the time the offense was committed so as to avoid all intermediate sales between the commission of the offense and the condemnation, and citing the *United States v. 1960 Bags of Coffee*, 8 Cr. 398, and *The Brigantine Mars*, 8 Id. 417, and *Gelston v. Hoyt*, 3 Wheat. 311, as conclusive upon the matter, they yet held, (as indeed they have in several other cases since,) that the rule is altogether different where the statute gives choice of actions, and cited *United States v. Grundy and Thornburg*, 3 Cr. 337, to sustain the exception to the general doctrine.

Attention has been called, in a previous chapter, to the curious fact that in the *Grundy and Thornburg* case, the United States *had elected* to proceed *in rem*, and the thing had been judicially released; *after which* the United States sued the insolvent offender's assignees. He had sold the offending vessel since the offense, as any sensible insolvent, not very scrupulous, would do under the circumstances, if sale would purge forfeiture; and, even upon these facts, it was held that there had been no forfeiture prior to the government's second election; that is, prior to the choice to sue for the value after the first choice had failed. Such a decision would not establish the exception to the general rule, even though the court had so able an organ as MARSHALL, C. J., especially when we reflect that the government had no right to a second choice, after the first had been decided by a decree of acquittal which was *res judicata*. The learned judge mentions that the court *a quo* did not mean to make a final disposition of the case, and that counsel on both sides had acquiesced in the court's views—but the disposition was legally final nevertheless. *Res judicata*, however, does not seem to have been pleaded in bar.

§ 185. **Bona Fide Sale Before Seizure.** Judge WAYNE, in Caldwell's case, fairly puts the question: "Are goods entered upon an invoice not according to the value thereof at the place of exportation, with design to evade the duties thereon or any part thereof, *eo instanti*, upon the false entry, a forfeiture to the United States, so as to avoid an intermediate sale of them to a

bona fide purchaser, or one altogether ignorant of the fraud, and in no way connected with the perpetrator of it, except in buying the goods of him at a fair price?" He answers, for the court, in the negative. But, in all forfeitures, sale may intervene between the offense and the seizure, and be perfectly good as to all persons but the United States; and good forever, should the government never choose to seize. When the government may either seize the offending thing or sue the person making the entry, can it be that the sale before seizure gives more sacred rights than in ordinary cases? If so, the election forfeits the goods—the offense does not; or, the offense coupled with the election, forfeits them, with the privilege granted to the owner to prevent the election on the part of the government by first himself electing to sell the offending thing, and limit the government to a single remedy, though the law-giver meant to give choice from two. And that one remedy is not necessarily against the owner, but against the person making the entry.

The dissent to the rule itself, whenever found, has been with regard to offending things. Though the Supreme Court has repeatedly affirmed the rule as herein stated, (that is, where there are no elective remedies,) yet other courts are slow to give the doctrine its full force.

Since the United States Supreme Court has settled the rule the other way, a lower court has held that condemnation does not retract further back than the seizure, unless "the intention of Congress that the forfeiture should be absolute and instantaneous," upon the commission of the offense, should be expressed by statute.¹ This is the overturning of the rule, if this is law. It is needless to add, that it is also the overturning of our revenue system, so far as any effective execution of it is concerned.

In Louisiana, the rule has lately been fully sustained.² It has been considered somewhat recently by Federal Courts;³ but it

¹ United States v. 56 Barrels Whisky, 1 Abb. U. S. Rep. 93; United States v. 100 Barrels Spirits, 2 Id. 305.

² Summers v. Clark, 29 La. Ann. 93.

³ See United States v. 64 Barrels of Distilled Spirits, 3 Cliff. 308; United

is to be noticed that the complete reaffirmance of the cases of the *Bags of Coffee*, and of the *Brigantine Mars*, by the Supreme Court in the case of *Henderson's Distilled Spirits*,¹ is limited to cases "where the forfeiture is made absolute by statute," thus countenancing the doctrine of the cases just above cited from Abbott's reports; but the doctrine has since been stated broadly by that court that reaction is to the offense.²

§ 186. **Status Cannot be Due to Seizure.** In the nature of things, it cannot be that seizure of a thing makes it guilty. Whatever guilt attaches to a thing must necessarily precede seizure, since the executive act of seizing finds its only justification in the previously acquired guilty *status* of the thing. Seizure is not the deed of the offending thing, but is an act of government. Government cannot make that guilty which was not guilty before.

Does seizure forfeit the thing? We have seen that condemnation does nothing more than declare the *status* of a previously forfeited thing. If it relates no further back than the time of the seizure, then it would follow, that the *status* of the thing, as a forfeited thing, must have been then acquired. That government can create such *status* by any act of its own, seems absurd.

If, then, condemnation relates to a point beyond seizure, to what point? If it relates to an antecedent forfeiture, to what time must it relate as the period when the *status* of the thing, as a guilty thing, was acquired? It must be the date of the offense. It must be the time when the thing contravened the law. It necessarily relates to something done in, with, or by the thing itself; and, as there is no other act imputed to the thing, by fiction of law, but the act by which the law was contravened, we are confined to that act and to the time of its commission. For seizure is neither the act of the thing, nor is it under the rule of the legal fiction. It is certain, therefore,

States v. Feigelstock, 14 Blatchf. 321;
The Mary Celeste, 2 Low. 354.

¹ *Henderson's Distilled Spirits*, 14 Wall. 44-

² *Thacher's Distilled Spirits*, 103 U. S. 679; *Thacher v. United States*, 15 Blatch. 15. See *Ante*, Chap. on Retroaction.

that if the condemnation does not relate to the time of the offense, there is no other time to which it can logically relate.

Statutes may mar the logic by fixing arbitrarily some other date; but the general rule of law is, in the absence of statute regulations requiring the government to abate some of its rights and not to insist upon retroaction to the furthest date, that condemnation relates to the offense. Statutes curtailing the rule must be confined to the particular circumstances which they cover. If, for instance, where election between two remedies, must precede seizure, if the statute prescribe that retroaction shall not reach back of such election, the modification of the rule should be limited to the particular case.

§ 187. **The Law of Relation as With Indebted and Hostile Things.** We may be aided by looking to the other two branches of proceedings *in rem*: to actions against things indebted and actions against things hostile, for the purpose of seeing what is the operation of the rule of retroaction in such cases.

In proceedings against the former, there can be no doubt that judgment relates to the time the thing became indebted. The foreclosure of mortgage retroacts to time when the mortgage contract was entered into, and avoids all subsequent conveyances to its prejudice; or, rather, the lien or indebtedness follows the thing through all subsequent conveyances, just as the government's right to a guilty thing follows it in all transfers succeeding the offensive act. Government liens against ships and cargoes for penalties incurred, many of which are vindicable *in rem*, cannot possibly be dislodged by intermediate transfers, between the creation of the lien and the seizure. Liens held by private persons, arising by operation of law upon contracts, cannot be affected by any act of the debtor-owners of the things on which the liens rest. If judgment related only to seizure, lien-holders would often find their rights absolutely worthless.

It is equally clear that the rule is always observed in actions against things hostile. Confiscation relates to the time when the things became hostile. Public law does not concern itself about property transactions among enemies. No transfer can relieve the thing once hostile from its confiscable character,

while war lasts. Exceptions in cases of nominally neutral ships which may have become *pro hac vice* hostile, and afterwards be purged of that character, may be suggested; but these exceptions do not affect the general law of relation, since, in case of a decree of condemnation, the decree would retroact in such case, as in others. If the hostility had been purged, there would be no condemnation.

In all cases, therefore, where hostile property is condemned, the condemnation retroacts to the time when the property first became hostile, and avoids all intermediate transfers. It would be folly to say that a prize ship is exempt from the rule; for how can one belligerent follow the conveyances of such property from one enemy to another? What sense would there be in the position that if she belonged to the enemy A. when the hostile character was acquired, she could not be confiscated after having been sold to the enemy B.? (The only exception with regard to a ship, is when she has been sold to a neutral and made a legitimate voyage.) Or, that goods might avoid confiscation by sale among enemies? Or that land might thus escape? Or that debts might save themselves from the confiscable state, already created, by the passage of notes from hand to hand among enemies? Where lands and debts are authorized by law to be proceeded against under the general authority of nations, they may serve as illustrations as well as ships and goods.

If there were no retroaction beyond capture or seizure, it must be that the capturing belligerent's *jus in re* originates by the very act done to vindicate the right: which seems absurd.

§ 188. **Exceptions May be Created by Statute.** As already observed, the time when the forfeiture occurs may be fixed arbitrarily by statute, so as to prevent the usual application of the law of relation. This has been done with regard to certain contraventions of law by offending things, but never to the acquisition of the hostile or indebted *status* by either enemy property or lien-bearing property.

With regard to enemy property, it cannot acquire hostile *status* by contravention of municipal law, since it is governed by the law of nations; but the time when it shall be seized for

confiscation, and the conditions under which there shall be procedure against it, may be fixed by statute. Accordingly, the "Act to Suppress Insurrection, etc.,"¹ authorized such seizure and procedure against enemy property, if the owners thereof should continue to be official enemies after this expression, by the political power, that such property, (already really forfeited,) should be arrested by the executive power, and should have its *status* passed upon by the judicial. It did not molest the law of retroaction, nor limit its operation.

A joint resolution, passed professedly to explain the statute, and bearing even date,² excepts the third clause of the fifth section of the act from the operation of the law of retroaction. The exception proves the rule.

If, after the passage of that act, property owned by official enemies, (except that designated in the third clause of the fifth section,) should continue to be enemy property by reason of continued hostile ownership evinced by hostile official acts, it was liable to be seized as forfeited, without reference to the time when its hostile character was acquired. It did not then matter whether such *status* was acquired before the passage of the act, or afterwards. It was not to be confiscated for the contravention of any statute, but for being 'enemy property under the law of nations.

It seems clear that the act forms no exception to the general rule of retroaction, but that the explanatory resolution, (if it could possibly be construed as amendatory,) does form an exception to the general rule of the act, and therefore to the general rule of the law of relation.

Sometimes this act has been treated as though it were a statute enactment for the forfeiture of offending things. Were it really such, it would be an illustration of retroaction restricted, so far as concerns one clause of one section only; and would properly be reviewable in this second book. As it is not, however, it must be referred to the third book. Here it is mentioned only by way of reasoning, to sustain and illustrate what has been advanced with regard to reaction, in the condem-

¹ 12 Stat. L. p. 590.

² Id. 627

nation of Things Guilty. For like purpose, reference has been made in this connection, to indebted things.

§ 189. **Meaning of the Term "Actual Cost."** The meaning of the words "actual cost," (in Sec. 2839, Rev. Stat. U. S.) is precisely the same as that of the same words in Sec. 66 of Act, March 2, 1799, which has received judicial exposition.¹ As expressed by Judge STORY in *Alfonso v. United States*, "‘actual cost’ means the actual price paid for the goods by the party in case of a real *bona fide* purchase, and not merely the market value of the goods; but then the market value may and often is, justly resorted to as a means of ascertaining the actual cost in doubtful and suspicious cases, for it may be fairly presumed, in ordinary cases, that the market value, and no more, and no less, is generally given for the commodity." The learned judge qualifies the purchase too closely, perhaps, when he requires that it must be "real," "*bona fide*," etc., since the statute merely requires the entry to be made as the price paid, without reference to the particulars of the shipper's original purchase. At the close of this decision, he says that he was very much inclined to hold that the 66th Section, so far as it inflicted forfeiture, applied only to cases where the shipper had purchased the goods for shipment, and not to cases where the goods were produce raised by him. He held it not necessary to decide the question, since it was not fairly raised. But how shall we treat it? Suppose the producer or manufacturer should enter goods fraudulently below their value to avoid the duties, could they be decreed forfeit under Sec. 2839? It costs something to raise agricultural products—to make valuable articles; but we think this fact would not bring them under the section, since the terms "cost" and "value" are of frequent occurrence in the revenue laws, and have been discussed in judicial decisions, till they have come to have meaning as legal terms, in addition to their signification in common parlance. They are often equivalents in ordinary use, but in this section, "cost" cannot, without violence, be interpreted to mean "value,"

¹ *United States v. 16 Packages*, 2 Mason, 48; *Tappan v. United States*,

Id. 393; *Alfonso v. United States*, 2 Story, 429; *Harding v. Whitney*, 4 Cliff. 96.

though generally the cost and value of merchantable commodities are the same. It cannot reasonably be assumed that everything in foreign marts is bought at its exact value; and therefore, when the two things are equivalent, in any particular case, that is a fact to be proved. This further appears by Sec. 2840.

Manufactured goods, agricultural products, etc., are sufficiently explained with reference to the terms "cost" and "value," in the sections¹ following that which we have been considering. The first form of oath therein required is to the "actual cost" if purchased; or to the "fair market value," if otherwise acquired. The second form requires oath to "the actual cost" with all charges. The third form is expressly for manufacturers; and they must swear to "a just and faithful valuation." These sections with their included forms of affidavits, are re-enacted from the Act of March 1, 1823.²

The invoice must be sworn to; and the oath must be by the owner, in cases where the owner is not, at the time of entry, residing in the United States, and the merchandise is subject to *ad valorem* duty, and has not been purchased, and belongs wholly or partly to the manufacturer. But in certain cases, the Secretary of the Treasury may admit goods without invoice (Sec 2847); and the oath required of the owner may be made by an executor, administrator, or assignee, where the former owner becomes deceased or bankrupt. Sec. 2846.

The terms "cost" and "value," in this connection, are further elucidated by Sec. 2854, with reference to the declarations that must accompany invoices of merchandise imported from foreign countries.³

§ 190. **False Invoice or False Certificate.** "Sec. 2864. If any owner, consignee or agent of any merchandise shall knowingly make or attempt to make, an entry thereof by means of any false invoice, or false certificate of a consul, vice-consul or

¹ Revised Stat. U. S., §§ 2840-1-2-
3 *et seq.*

² 3 U. S. Stat. at Large, 730-2-3.

³ 3109 Cases of Champagne, 1 Ben.
241; 1209 Quarter Casks of Sherry

Wine, 2 Ben. 249; Six Cases of Silk
Ribbons, 3 Ben. 536; United States
v. Clapboards, 4 Cliff. 301; Harding
v. Whiting, Id. 96.

commercial agent, or of any invoice which does not contain a true statement of all the particulars hereinbefore required, or by means of any other false or fraudulent document or paper, or of any other false or fraudulent practice or appliance whatever, such merchandise or the value thereof shall be forfeited.”¹ By amendment to this section, the forfeiture applies only to the case or package containing the offending article, and the act must be done to defraud.

It will be observed that “fraudulently” is omitted from this section, but the coupling of the word “knowingly” with “false invoice,” etc., contains a qualification nearly, if not wholly, equivalent. If entry be made by means of a false consular certificate or false invoice, the law will presume it “knowingly” done. As criminal prosecution against persons is contemplated by this section, (though provided elsewhere²) it is a matter of no consequence whether the statute makes the goods guilty for having been fraudulently entered or for having been knowingly entered falsely. The Circuit Court, in a case against certain wines, (the case entitled *Cliquot’s Champagne* in the Supreme Court Reports,) though refusing to charge that the terms were equivalent, said that either form expressed the same idea; and the Supreme Court coincided.³

In this case we have exposition of the word “*placé*,” occurring in Sec. 1 of the Act of 1863, (12 S. L. 738; it is held that “it does not mean any locality more limited than the country where the goods are bought or manufactured.” And that the principal markets of such country may be consulted to ascertain the value of such goods. And it was held that prices current might be used in evidence to show value, though they were from houses situated in cities other than that from which the wines were imported. The prices current had been given to a witness by a dealer.

When such a paper as this is receivable, it should be verified by proof of its genuineness; it should be of the date or near

¹ Rev. Stat., § 2864, 16 Opin. Att’y Gen., 158.

² U. S. Rev. Stat., §§ 5444, 5452, 2865.

³ *Cliquot’s Champagne*, 3 Wall. 114. See *United States v. York St. Flax Spinning Co.*, 17 Blatchf. 138.

the date, of the time of the offense as charged; it should be of the place of the false entry, if it is to be entitled to much weight; and it would be less suspicious, if offered from a respectable newspaper than from a mere circular of a business house—a thing easily imitated. Letters of third parties abroad, to other third parties, offering wines at certain prices, have been received in evidence.¹ Forfeiture for false valuation or a false invoice has been repeatedly adjudged and most of the questions arising under Sections 2864 and 2865 of the Revised Statutes have been settled.²

§ 191. **Burden of Proof Shifted.** In the Cliquot champagne case, the court applied the doctrine that, after probable cause established by the government, the burden of proof is shifted to the claimant, notwithstanding the provision of the Act of 1799, Sec. 71st, was not expressly incorporated into that of 1863. It is generally understood now, though the doctrine has been stoutly fought, that this rule of *onus probandi* is a general feature of our revenue system, applicable in all suits for forfeiture thereunder, without express mention by statute, in every case.

In the case of Cliquot's Champagne, the court referred to the four cases, (above cited,) of Wood, Clifton, Taylor and Buckley, to show instances in which the rule had been applied under statutes not expressly authorizing it.

Though there has been much latitude taken as to what amounts to probable cause, there can be no doubt that when the libellant has established all the necessary facts except those that are solely within the knowledge of the claimant and presumably true should he remain silent, probable cause is shown. Ordi-

¹ Fennerstein's Champagne, 3 Wall. 145.

² United States v. Tappan, 11 Wheat. 419; Cliquot's Champagne, 3 Wall. 114; 3 Parcels of Embroidery, 3 Ware. 75; 39,150 Cigars, Id. 324; 100 Boxes of Sugar, 2 Story, 421; 16 Packages of Goods, 2 Mason, 48; United States v. Newmark, 3 Saw. 584; 14 Packages of Pins, 1

Gilpin, 235; 28 Packages of Pins, Id. 306; A Package of Lace, Id. 338; 250 Pounds of Coney Wool, etc., Id. 349; 53 Boxes of Havana Sugar, 2 Bond, 346; 3,109 Cases of Champagne, 1 Ben. 241; 1,209 Quarter Casks, etc., of Sherry Wine, 2 Id. 249; Six Cases of Silk Ribbons, 3 Id. 536; United States v. Barnes, 6 Id. 183; Sinn et al. v. United States, 14 Id. 550.

narily the pleader having the affirmative of an issue must make it out, at least *prima facie*, before the *onus* can be thrown upon the opposite side. But in revenue cases especially, there are many circumstances which give rise to presumptions against vessels and cargoes and other property under seizure, so that, without complete, direct proof, probable cause may be established. Distinction should always be drawn, however, between probable cause for condemnation and probable cause for seizure. The latter arises under much slighter circumstances. One can hardly state the facts under which probable cause arises, except by repeating the circumstances of the cases in which they have been passed upon.¹

The burden of proof in an action against property is precisely as in an action against a person. The libellant or informant cannot escape the necessity of making out his case. When there has been seizure and publication, yet no response by any claimant, condemnation often follows, but not before the allegations have been taken *pro confesso* upon notice, and then offered in evidence against the thing proceeded against, thus making out the case. When a claimant appears, he is in the position of a plaintiff, so far as his allegation of ownership is concerned, but not so with regard to the *status* of the thing in question, whether it is a forfeited article or not. No general rule can be laid down better than that whoever has the affirmative of a proposition must establish it; but, in the conduct of revenue causes, it sometimes becomes a nice question, in different stages of a cause, which has the affirmative, under the facts that arise;²

¹ United States v. Riddle, 5 Cr. 311; The Gala Plaid, 1 Brown Ad. 1; The Ship Recorder, 2 Blatch. 119; Stoughton v. Dimick, 3 Id. 356; The Brig Henry, 4 Id. 359; The Apollon, 9 Wheat. 362; 60 Pipes of Brandy, 10 Id. 421; The Palmyra, 12 Id. 1; Shattuck v. Maley, 1 Wash. C. C. 245; Maley v. Shattuck, 3 Cr. 458; United States v. One Sorrel Horse, 22 Vt. 655; 26 Diamond Rings, 1 Sprague, 294; Carrington v. Merchants' Ins. Co., 8 Pet. 495; Wood v.

United States, 16 Pet. 342; Clifton v. United States, 4 How. 242; The Schooner Friendship and Cargo, 1 Gall. 111; R. S., § 970.

² Locke v. United States, 7 Cr. 339; Taylor et al. v. United States, 3 How. 197; Wood v. United States, 16 Pet. 342; The Ship Octavia, 1 Wheat. 20; The Josefa Segunda, 5 Id. 338; 3109 Cases of Champagne, 1 Ben. 241; 508 Barrels of Distilled Spirits, 5 Blatch. 407; 18 Barrels of High Wines, 8 Id. 475; The Brig Busy, 2

and it is often a matter of dispute whether or not the *onus probandi* has been shifted.¹

The words "with design to avoid payment of duty," are not contained in section 2864 as in 2839: so it has been held that though full duty was paid, entry by false invoice or certificate rendered the goods forfeit.²

If the "false certificate of a consul, vice-consul or commercial agent," has enabled "the owner, consignee or agent of any merchandise," to violate this section, the complicity of such officer is no excuse for the wrongdoer. The reasoning to this effect, in a case³ under the Internal Revenue Laws, is fully applicable here.

When vessels are used by common carriers, they are not subject to forfeiture under the provisions of the thirty-fourth title of the Revised Statutes, unless the master or owner of any such vessel be shown to have been a consenting party or privy to the illegal act charged.⁴ This change should be borne in mind throughout this and the succeeding chapter. It materially qualifies §§ 2797, 2807, 2867, 2872, 2874, 2887, 2893, 3059, 3061, 3062, 3101, 3104, so far as they refer to seizure and forfeiture.

Curt. 586; *The Brig Short Staple*, 1 Gall. 104; *United States v. Hayward*, 2 Gall. 485; *The Schooner Abigail*, 3 Mason, 331; *The Ship Fair American*, 27 Pet. C. C. 98; R. S., 909, 3333.

¹ *Hopkirk v. Page*, 2 Brook. 20; 25 Cases of Cloth, etc., Crabbe, 356; *Locke v. United States*, 7 Cr. 339; *United States v. Hayward*, 2 Gall. 485; *Bank of United States v. Bev-*

erly, 1 How. 134; *Randel v. Brown*, 2 Id. 406; *Taylor et al. v. United States*, 3 Id. 197; *The Steamtug Wm. Young*, Olc. Ad. 38; *Clarke & Briscoe v. White*, 12 Pet. 178; *Wood v. United States*, 16 Id. 342.

² *Bollinger's Champagne*, 3 Wall. 560.

³ *United States v. A Distillery, etc.*, 8 Ben. 473.

⁴ Act Feb. 8, 1881, 21 Stat. L. 322.

CHAPTER XXI.

FORFEITURES UNDER THE COLLECTION LAWS—CONTINUED.

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§ 192. **Unlawful Unlading.** Goods, unladen without a permit, become forfeit.¹ The unlading must be within the limits of a district of the United States or within four leagues of the coast. Since many of the districts include bays and other waters of the sea, the limits of a district may not be coincident with the coast of the United States, as Judge STORY remarks, in *The Betsey*.²

A permit illegally given, by collusion between the collector and the owner, is void; and the goods landed under it may be declared forfeited. And the charge is good if the allegation in the libel is that the goods were landed without a permit, since a fraudulent one is no permit. Such was the ruling on a case growing out of goods landed in New York, under collusion between the deputy collector and the subsequent claimant of the goods.³ It has been held that the permit to unlade must be written.⁴

Goods upon vessels, from foreign ports, which have arrived in port, or within four leagues thereof, "are, in legal contemplation, in the custody of the United States," and are not amenable to process of attachment issued out of a State court;

¹ Rev. Stat., § 2867.

² *The Schooner Betsey*, 1 Mason, 353.

³ *Bottomley v. United States*, 1 Story, 135.

⁴ *Schooner Sarah B. Harris*, 4 Cliff. 147.

for "an attachment of such goods by a State officer, presupposes the right to take possession and custody of those goods, and make such possession and custody exclusive. If the officer attaches upon *mesne* process, he has a right to hold possession to answer the exigency of that process. If he attaches upon an execution, he is bound to sell or may sell the goods within a limited period, and thus virtually displace the custody of the United States. The act of Congress recognizes no such authority, and admits of no such exercise of right."¹

The general law of forfeiture of imported goods for landing without permit, has been well settled, and requires no comment.²

Not only goods landed without permit, but the vessel into which they are transferred for that purpose, becomes forfeit.³ Accident, distress and necessity excuse in both cases, and may be proved by the master's notice to the collector, with his oath and that of the next officer and that of another officer and mariner.

A Spanish ship, captured by a privateer under the flag of Buenos Ayres, was brought to the United States by the prize master, and partly unladen on the schooner *Betsy*, within the port of Portland, or the legal bounds of four leagues. It seems the ship had not been bound for this country before capture, but that the prize master had turned smuggler, and had unloaded without a permit. Under these circumstances, the schooner was condemned.⁴

It will be seen that, under the two sections, 2867-8, for unloading without a permit, (either from a foreign or domestic vessel,) the goods so unladen are forfeited, but not the vessel

¹ *Harris v. Dennie*, 3 Pet. 292; *The Sarah B. Harris*, 4 Cliff. 147.

² *The Schooner Industry*, 1 Gall. 114; *The Schooner Harmony*, 1 Gall. 123; *United States v. Smith*, 2 Wa. h. C. C. 310; *Clark v. Insurance Co.*, 1 Story, 109; 114 Pieces of Broadcloth, Id. 135; *The Virgin*, 1 Pet. C. C. 7; *The Brant*, Id. 14; *Pero v. United States*, Id. 256; 480 Pieces of Bagging, 8 Cr. 109; *Priestman v. United States*, 4 Dall. 28; *The Schooner Bet-*

sey, 1 Mason, 354; *Four Packages*, 97 U. S. 404; *Stinson v. Wyman*, 2 Ware, 176; *The John C. Brooks*, 3 Ware, 273; *The Gertrude*, 3 Story, 68; *United States v. Three Cases marked A. D.*, 6 Ben. 558; 2,000 Tin Cans, 7 Ben. 34; 20 Cases of Matches, 2 Biss. 47; *The Cuba*, 2 Hughes, 489.

³ Rev. Stat., § 2868.

⁴ *The Schooner Betsey*, 1 Mason, 354.

from which they are taken; while the vessel upon which they are reloaded for landing, if any, becomes forfeited. The distinct offense of which the goods are guilty is that of being used in smuggling; such also is the offense of the vessel used in the unlawful landing. Merchandise taken from a vessel, without permit, more than four leagues from shore, would not be forfeitable under this section.¹ There have been several interesting decisions, touching these sections, by the circuit courts.²

§ 193. **Unlading at Night, Etc.** No merchandise brought in a vessel from a foreign port, can lawfully be unladen after sunset and before sunrise, unless it is specially permitted by the collector with the concurrence of the naval officer, after having taken an indemnifying bond, and after his issuing of a general order, followed by an application to him for such permit. Violation of this provision exposes the goods unladen to forfeiture; and the vessel, too, if the goods. unloaded in the night, are worth four hundred dollars.³

The unloading of unlawfully imported goods, in the nighttime, incurs forfeiture, just as that of lawfully imported goods would.⁴ Goods brought in on a coasting trade vessel, are not liable to forfeiture for unloading contrary to section 2874, nor is the vessel; even though the goods be foreign, since no permit to unload is required of coasting vessels,⁵ by this section. And foreign vessels, laden abroad, not bound for the United States but forced hither by stress of weather, are not considered as vessels importing foreign goods so as to be liable for duties; and wrecked vessels are not required to get a permit to land the fragments of the wreck, though they may be goods in some sense.⁶

§ 194. **Probable Cause for Condemnation.** The ship Wen-

¹ *The Virgin*, Peters, C. C. 7.

² *The Schooner Industry*, 1 Gal. 114; *The Schooner Harmony*, Id. 123; *United States v. Hayward*, 2 Gal. 485; *United States v. Brant*, Pet. C. C. 14.

³ *Rev. Stat. United States*, §§ 2,871-2-4.

⁴ *Hartford, Claimant of 480 Pieces*

of Bagging, *v. United States*, 8 Cr. 109.

⁵ *Jackson v. United States*, 4 *Mason*, 191.

⁶ *The Gertrude*, 3 *Story*, 68; *Perots & Chamberlain v. United States*, Peters' C. C. 256; *United States v. Arnold*, 1 *Gall.* 348.

dell's cargo was condemned because unladen without permit in violation of section 50 of the Act of 1799, (to which sections 2872-3-4 of R. S. correspond,) though the libel charged that the goods had been imported from some foreign port or place to the attorney unknown, into some port of the United States to the attorney unknown, in a certain vessel to the attorney unknown; and were afterwards, and before the filing of the libel unloaded at Baltimore from the Wendell without a permit from the proper officers of the customs of the last named port. The evidence of the Wendell's bringing the goods from Boston, and of their foreign character, together with proof of various suspicious circumstances, satisfied the Supreme Court that probable cause was established so as to shift the *onus* of proof; and the cargo was condemned.¹ But it is necessary, in libels under this section, to allege that the goods were unladen in some port or place within a collection district, without a permit from the collector of that port or district, though the attorney may allege that the port or district is to him unknown.² However, the goods are not liable, under this section, when the vessel has not arrived at her port of discharge.³ There have been judicial expositions on other points, upon which it seems unnecessary to dwell.⁴

§ 195. **Unlawful Removing.** The removal of merchandise brought from a foreign port in a vessel, which requires to be weighed, gauged or measured to ascertain the duties thereon, shall not be removed from the landing place without the consent of the proper officer, before the weighing, gauging or measuring of it; and, if the merchandise be spirits, wines or sugars, they shall not be removed before the quality and quantity shall have been ascertained, and marked on the goods. Forfeiture of such goods is the effect of a contravention of this provision.⁵

"The * * * section relates to the removal of goods from the wharf or place on which they may have been landed. * * * It presupposes a permit, and that they were landed under the

¹ *Locke v. United States*, 7 Cr. 339.

² *United States v. Burnham*, Claimant, etc., 1 Mason, 57.

³ *The Hunter*, Pet. C. C. 10.

⁴ *Schooner Industry*, 1 Gall. 114; *Schooner Harmony*, Id. 123; *Walsh v. United States*, 3 Wood. & M. 341.

⁵ *United States Rev. Stat.*, § 2,882

inspection of the revenue officer. * * * It presupposes a case in which the gauging and marking may be done, and the other means prescribed for the ascertainment of the duties and security of the revenue may be taken, at the place of landing; not a case in which a landing must be made without a permit, often in the absence of a revenue officer, and where the goods could not be permitted, without extreme peril, to remain at the place of landing until these measures should be taken. * *

* The removal, for which the act punishes the owner with the forfeiture of the goods, must be made with his consent or connivance, or with that of some person employed or trusted by him. If, by private theft, or open robbery, without any fault on his part, his property, should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of his property."¹ The facts upon which the foregoing views were written, seem fully to warrant the liberal construction of the section under such circumstances; but, if the owner, in other cases, were allowed such immunity under the idea that the forfeiture is a personal punishment to him, and that he could have all the presumptions in his favor which are accorded in criminal prosecutions, it would be found very difficult to enforce the laws of the revenue. Here the ship *Favorite* had been found on the Delaware Bay, a wreck; the goods landed on the beach near Lewes, Del., followed by contention between the salvors and the owners; and strict compliance with the law prohibiting removal without the gauging of the casks of wines and cordials was almost impossible. Laws should be administered and enforced with due regard to circumstances. In ordinary cases, it would seem that the statute might be literally followed without working injustice.

Permits for the unlading of spirits or wines must be submitted to the inspector, who shall endorse them "Inspected:" otherwise the liquors, if landed, would become forfeit.²

And such imported liquors, though thus endorsed, would be

¹ *Peisch v. Ware*, (Marshall, C. J.,)
4 Cr. 347.

² Rev. Stat., § 2883.

forfeited, if landed otherwise than under the inspecting officer's eye.¹

The surveyor, or any officer acting as inspector of revenue for the port, and such of the inspectors of the customs as shall be deputed by him for the purpose, shall be in attendance to superintend the landing of the liquors and to do the marking required by law.

§ 196. **Fraudulent Omission to Invoice.** The collector must designate one package or more of every invoice, and of every ten packages of imported merchandise, to be examined and appraised. If the appraisers find any article in a package not specified in the invoice, and believe it was fraudulently omitted, the package becomes liable to forfeiture, "on conviction thereof before any court of competent jurisdiction."²

The words "conviction thereof" will be understood to mean the conviction of the package, it having been fraudulently omitted from the invoice, though the expression in Sec. 2901 of the Revised Statutes seems somewhat ambiguous. The article is placed in the chapter on appraisal, and the leading idea of it is the duty of a majority of the appraisers to cause the seizure of any package fraudulently invoiced by the omission, with fraudulent intent, on the part of its owner, shipper or agent, of any article contained in it. Finding the subject introduced here, we will consider it briefly, though a little out of our regular order.

Appraisements made pursuant to such a provision as this, are admissible in evidence, on a prosecution of falsely invoiced goods to have them condemned as forfeited. "They are documents, or public writings not judicial. As such, they may be used as evidence, subject to the rules applicable to the admissibility of such writings as evidence. The originals or examined copies are admissible, as is the case wherever the original is of a public nature. They are within the reach of either party in a cause; either for inspection or for copies, when a copy is wanted to be used as evidence. We need not enumerate the classes of such writings, or the particular kinds of them which,

¹ Rev. Stat., § 2884.

² Rev. Stat., § 2901.

from analogy, have been adjudicated to be such, as both may be found in any elementary treatise upon evidence. There is authority for so classing these appraisements. It has been decided that a copy of an official document, containing an account of the cargo of a ship, made in pursuance of an act of parliament by an officer of the customs, and lodged there as an official document, should be admitted as proof that the property mentioned in it was put on board of a vessel. So, also, the copy of an official document containing the names, capacities, and descriptions of passengers on board a vessel, made in pursuance of an act of parliament, has been received as proof of such persons being on board. *Richardson v. Mellish*, 1 Ryan & Moody, 68; 2 Bing. 229.”¹

Of course such appraisements may be met by counter evidence, as they are of no higher grade than other facts of official action. It was held² that where merchant appraisers were appointed to review the decision of the public appraisers, (by virtue of the tariff acts of 1842 and 1846,) it was a question of fact for the jury to decide whether the examination of samples drawn some weeks before their appraisalment was a substantial compliance with the law which required them to examine one package at least of every ten packages of goods.

Certainly it is the sense of Sec. 2901 (R. S.) that the test packages should be examined at the time they are opened; but, in a prosecution of goods for omission from the invoice, if the offense be established, it is of little consequence, on the trial, how the fact of the commission of the offense may have been ascertained.

On an examination before any appraiser, collector and naval officer, if the owner, importer or consignee of merchandise shall willfully and corruptly swear falsely, the merchandise concerning which the oath is made, shall be forfeited.³ Such false swearing is made perjury by the statute, for which any person guilty is liable to prosecution, while the forfeiture is an additional result of the false oath, affecting the goods only when

¹ *Buckley v. United States* (Wayne, J.,) 4 How. 251.

² *Converse, Adm'r of Greely, v. Burgess*, 18. How. 413.

³ Rev. Stat. 2924.

the affidavit is by the owner, importer or consignee. The collector's decision as to the amount of duties, is final, unless appealed to the Secretary of the Treasury.¹

§ 197. **Wrongful Exportation, Importation, Etc., and Drawback.** There is an alternate remedy given by Sec. 3001, of the Revised Statutes. Failure to transport and deliver bonded merchandise to the collector of the port to which it is designated, within the legal delay, (when transferred from one collection district-port to another,) renders the goods liable to double duties or to forfeiture. And any vessel or vehicle would become liable to forfeiture, if its master, owner or conductor should transport such goods in it, yet fail to deliver the bonded goods to the collector of the designated port of the district to which they are transferred.²

Merchandise exported to Mexico, or the British North American Provinces, if voluntarily landed or brought into the United States, shall be forfeited. Sec. 3008.

Where merchandise is entered for re-exportation with the right of drawback, it is the duty of the collector to have it inspected, and the articles compared with their respective invoices, before a permit shall be given for landing it. Where the merchandise shall be found not to agree with the entry, it shall be forfeited. (Sec. 3033.) The next section provides for the forfeiture of merchandise subject to *ad valorem* duty, intended for exportation with benefit of drawback, transported from one district to another, if not found to correspond with the original invoice.

"Merchandise entered for exportation, with intent to drawback the duties, or to obtain any allowance given by law on the exportation thereof," if "landed within any point within the limits of the United States, shall be subject to seizure and forfeiture, together with the vessel from which such merchandise shall be landed, and the vessels and the boats used in landing" it. (Sec. 3049, R. S.) And the discharge of goods into a lighter is the landing of them.³ False entry shall forfeit the

¹ United States v. Phelps, 17 Blatchf. 312; Westray v. United States, 18 Wall. 322.

² United States v. Pingree, 1 Sprague, 339.

³ 2000 Tin Cans, 7 Ben. 34

goods falsely entered, by the next section, where the object is to defraud. Sec. 3051.¹

§ 198. **The Collection of Duties.** Consignees of imported merchandise are deemed the owners of it, for all the purposes of Title xxxiv. of the Revised Statutes, on the collection of duties, notwithstanding any sale, transfer, or assignment prior to the entry and payment of the duties on such merchandise, and the payment of all bonds then due and unsatisfied by the consignee.² It was held by the Supreme Court in the *Harris-Dennie* case, that such goods could not be attached, by process from a State Court, prior to their entry, while the duties were unpaid. Judge SROER held in *Howland v. Harris*, that the above-cited section (which is copied from the Act of 1799, which he was expounding,) does not prevent the consignee from passing, by sale or otherwise, a good title to the goods, subject to the payment of the duties thereon.

Search may be made, by any revenue officer, or by any person appointed for the purpose by a collector, surveyor or naval officer, of any vessel within or without his district; and if any breach of the collection laws be discovered whereby the vessel or any of its cargo is forfeitable, he may seize the forfeitable thing.³ And the right of search and seizure is extended, (section 3061) to "any vehicle, beast or person," trunk or envelope, if suspected. And the vehicle, beast, trunk, etc., with the merchandise thus illegally conveyed, shall be forfeited. (Section 3062.) But railway cars, engines or other steam vehicles, run as common carriers, are excepted from the rule, (section 3063,) and from the forfeitures denounced in the entire Title xxxiv., if

¹ *Barlow v. United States*, 7 Pet. 404; *United States v. 85 Hhds. Sugar*, 2 Paine, 54.

² R. S., § 3058; *Harris v. Dennie*, 3 Pet. 292; *Conrad v. Atlantic Ins. Co.*, 1 Pet. 386; *Cunard v. Pacific Ins. Co.*, 6 Pet. 262; *Conrad v. Nicoll*, 4 Pet. 291; *United States v. Lyman*, 1 Mason, 482; *Howland v. Harris*, 4 Mason, 497; *Arthur v. Dodge*, 101 U. S. 34; *Greenleaf v. Goodrich*, Id. 278; *Powers v. Comly*, Id. 789; *Lane v. Rus-*

sell, 4 Cliff. 122; *Dike v. Howe*, 4 Cliff. 132; *McGlinchy v. United States*, 4 Cliff. 312; *Perkins v. United States*, 4 Cliff. 321; *United States v. Nash*, Id. 107; *Russell v. United States*, 15 Blatchf. 26; *Butterfield v. Arthur*, 16 Blatchf. 216.

³ R. S., § 3057; *Gelston v. Hoyt*, 3 Wh. 246; *United States v. The Mars*, 1 Gallis. 237; *The Joshua Leviness*, 9 Ben. 339.

the person in charge, at the time of the unlawful importation, is not privy to, and consenting to, the offense.

Merchandise found concealed, in a dwelling house or elsewhere, upon which duties for importation are due and unpaid, shall be forfeited. (Section 3066.)¹ But not if the duties have been "secured to be paid."²

The withdrawal of goods from a bonded warehouse, upon the collector's permit obtained by fraud, does not protect from forfeiture for duties unpaid.³

There is provision⁴ for the sale of imported merchandise of the value of not more than five hundred dollars, seized for violation of law, (in all cases where the collector has advertised in vain for a claimant to appear and bond it,) without the intervention of a court. This is similar to a provision found in the internal revenue laws. There certainly can be no good reason why the seizure should not be followed by information *in rem*, with notice to all persons to claim. The executing of a bond of \$250 for the privilege of claiming in court, as required in the sections cited, is a great hardship. If the value of the goods be so small as to render such court proceeding impracticable without more trouble and cost than the goods are worth, the duties must be quite insignificant. If nobody should apply to the Secretary of the Treasury for remittance of the forfeiture, and prove his own ignorance and innocence, within three months of the sale of the uncondemned goods, the Secretary of the Treasury shall order the distribution of the proceeds "in the same manner as if such property had been condemned and sold in pursuance of a *decree of a competent court*." (Section 3079.) The language is nearly, if not quite the same as that used in the title on The Internal Revenue.

§ 199. **Smuggled Goods Subject to Civil Action.** Smuggled goods shall be forfeited.⁵

¹ Taylor v. United States, 3 How. 197; United States v. Certain Hogsheads, 1 Curt. 276; United States v. 26 Diamond Rings, 1 Sprague, 294.

² United States v. 360 Chests of Tea, 12 Wh. 486.

³ United States v. 278 Barrels of Spirits, 3 Cliff. 261.

⁴ §§ 3074-5-6-7-8.

⁵ R. S., § 3082; United States v. Claffin, (7 Otto,) 97 U. S. 546; United States v. 67 Packages, 17 How. 85;

In the cases of *Claffin* ads. *United States*,¹ the Supreme Court, through Judge STRONG, said that article 3082 of the Revised Statutes, does not authorize a civil action. Certainly it authorizes a criminal one; but did the court have in view the civil action *in rem* for the forfeiture of the smuggled goods? If the latter remedy is cut off, the article will frequently be found nugatory, since the smuggler cannot always be discovered, arrested and cited for the purpose of a criminal prosecution.

The exact words of the section are, "such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years or both." There is a civil action against the goods, *and* a criminal action against the smuggler.² The authorization of the two actions is common throughout the revenue and navigation laws. If the forfeiture of the merchandise is to be treated, under this section, as confined to the personal penalty following the conviction of the smuggler, along with the moneyed penalty by way of fine, it is highly important that Congress should amend the section so as to give the civil remedy against the goods.

United States v. Farnsworth, 1 Mason, 1; *United States v. Cook*, 1 Sprague, 213; *The Bark Antilles*, 8 Ben. 9; *Stockwell v. United States*, 13 Wall. 531; *Clark v. Protection Ins. Co.*, 1 Story, 109.

¹ *United States v. Claffin*, 97 U. S. 546, 553.

² *United States v. Thomas*, 4 Ben. 370; *Two Trunks Containing Fringe*, 6 Id. 218; *The Steamship Queen*, 11 Blatch. 416; *A Lot of Jewelry*, 13 Id. 60.

CHAPTER XXII.

COMMERCE WITH CONTIGUOUS COUNTRIES.

Failure to Deliver Manifest of Imported Merchandise... .. 200	Buildings Concealing Dutiable Goods Forfeited and Destroyed 202
Sealed Vessels, etc., when Forfeited 201	Vessels Forfeited for Proceeding Inland, etc., without Permit .. 203

§ 200. **Failure to Deliver Manifest of Imported Merchandise.** Vessels, boats, rafts, and carriages of every kind, arriving in collection districts which are, or may be, established on the northern and northwestern boundaries of the United States, containing merchandise subject to duties, on being imported into any port of entry of the United States shall be there reported to the collector or other chief officer of the customs. Such importations shall be subject to such regulations, penalties and forfeitures "as in other districts," except as otherwise provided in Chapter XI. of the Revised Statutes.¹ Such foreign merchandise shall be forfeited, (if not brought in a registered vessel,) for failure of the captain or other person in charge, to deliver a manifest to the collector or his deputy nearest to the boundary line, or to the road or waters by which the goods are brought; also the vessel, boat, canoe, raft, tackle, etc., carriage, sleigh, harness, cattle, horses, saddles, bridles, etc., used in bringing such goods into the country.

It will be observed that this forfeiture does not depend upon the intent to defraud the revenue, or an attempt to pass a fraudulent invoice, but that it attaches upon the simple failure to deliver a manifest, whatever the intent.² The forfeiture is incurred by the property for being brought into the United States from an adjacent country without the delivery of a manifest by the person in charge of it, to the nearest customs officer

¹ § 3099 R. S.

² But see *ante*, § 148, closing paragraph.

authorized to receive such description of it. No formal entry nor invoice is required under the peculiar system governing imports from contiguous countries. There must be a sworn manifest, and that is about all that is required under the simple rules governing such importation.¹

Such merchandise shall be unladen in the presence of an inspector, who may open any trunk or package for the purpose of examination; and failure on the part of the owner, agent, etc., to submit such goods for inspection and to comply with the officer's legal demands in such matter, makes it the duty of the inspector to retain the trunk or other case or package, etc.; and, if he find therein dutiable goods, they with their envelope shall be forfeited.² Vessels, cars, vehicles of any kind, are subject to forfeiture, like traveling baggage, for such offense.

§ 201. **Sealed Vessels, Etc., When Forfeited.** The sealing of vessels, cars, vehicles, baggage, merchandise, etc., relieves them of the necessity of inspection at the first port of arrival.

The sealing is done at the request of the owner, agent, master, conductor or custodian of the vessel, vehicle or goods. It is done by "any officer of the United States duly authorized to act in the premises," in accordance with the regulations of the Secretary of the Treasury. The thing sealed may then proceed to the port of its destination.

Such sealed property shall be forfeited:³

If not taken, without unnecessary delay, to the port designated, and duly delivered to the proper officer of the customs.

If sold or otherwise "disposed of" by the owner, agent, or other custodian, between the sealing and arrival at final port.

If unloaded in whole or part at any other than the port of destination stated in the manifest.

Both car and contents become forfeit, (vessel and contents, trunk and contents, any thing and contents,) if either be sold *in transitu*, to say nothing of the offender's personal liability to a fine of one thousand dollars and imprisonment for five

¹ United States v. Smith, 2 Blatch. 127; 134,901 Feet of Pine Lumber, 4 Ib. 182; United States v. Nolton, 5
² R. S. §§ 3100-01
³ R. S. §§ 3102-3-4.

years, either or both, for any one of the above enumerated items of legal contravention.

Breaking the seal forfeits the sealed thing: sealing a thing without authority, also forfeits it.¹ Sec. 3106 enumerates among the things forfeitable, for being unlawfully sealed or deprived of seal: vessel, car, vehicle, crate, box, bag, basket, barrel, bundle, cask, trunk, package, parcel; and then closes with the comprehensive words, "or other thing, with the cargo or contents thereof."

§ 202. **Buildings Concealing Dutiable Goods Forfeited and Destroyed.** Any building "upon or near the boundary line between the United States and any foreign country" shall be "seized, forfeited" and "forthwith taken down or removed," if dutiable merchandise is found deposited therein in violation of law.² The language of the statute is, "if * * * there is reason to believe that dutiable merchandise is deposited or has been placed therein or carried through or into the same without payment of duties, and in violation of law, and the collector * * * shall make oath * * * that he * * * does believe that *such offense* has been therein committed, such officer shall have the right to search such building * * * and if any such merchandise shall be found therein, the same, together with the building, shall be seized, forfeited." * * *

The building might be "near the boundary line" but beyond it and beyond the jurisdiction of the country. We are obliged to understand this phrase so as to make it consonant with our jurisdictional authority. If we may go to the boundary line between us and Canada, and there destroy a house built across it, we certainly cannot go further, unless under treaty provisions.

The building may be a warehouse or even a private dwelling. The officer whose belief entitles him to make the preliminary oath, is the collector, or the surveyor, or the naval officer, or the deputy collector. This preliminary oath, by the terms of the statute literally taken, entitles him to make the search. Doubtless the law-giver intended, since the oath must be made

¹ R. S. § 3106.

² R. S. § 3107.

before a magistrate, that he should be armed with a search warrant before proceeding to the very serious business of searching houses. The language is hardly of sufficient ambiguity to justify us in resorting to the received rules of interpretation to ascertain what the intention was. We have no right to consult the context, nor the will of the legislator as shown by the debates when the statute was enacted, in order to get at the meaning, if there is really no ambiguity. The most that we can do with the thing is to say that this act requires the customs-officer's oath only, but that before making search, he had better consult another statute which makes the warrant essential.

While belief, and reason to believe, on the part of the officer, that smuggled goods have been carried through the house, or into the house, enables him to make the oath, the house and smuggled goods are not forfeitable upon the belief being found true: for the goods must be found in the house to render them and it forfeitable. Goods carried through the house X, and found in Y, would be forfeit—but not the house X, under this law. Any person, however, for depositing, carrying through, etc., is punishable under Sec. 3108.

The “taking down or removing of the building” cannot be done until the property has been judicially declared to have been forfeited for the purpose. Then, the removal would be a mere disposition by the government of condemned property. This provision is merely directory, in prospect of the government's becoming the lawful disposer of the building.

§ 203. **Vessels Forfeited for Proceeding Inland, Etc., Without Permit.** A vessel becomes forfeited, if, after having arrived within the waters of the United States from any foreign territory adjacent to our northern, northeastern, or northwestern frontier, and having been reported by the master to the customs office nearest to the point at which she has entered our waters, she should proceed further inland either to unload or take in cargo, without a special permit from the collector or deputy, issued in accordance with the treasury regulations.¹ And if

¹ R. S. § 3109.

any merchandise, at any of our ports on those frontiers, shall be laden upon a vessel owned or partly owned by a foreigner, and taken thence to a foreign port to be re-laden and re-shipped to some other of our ports on those frontiers by that or any other vessel, foreign or American, with intent to evade the provisions governing transportation from one of our ports to another in a vessel owned or partly owned by a foreigner, it shall be seized on its arrival at the port to which it was thus re-shipped, and shall be forfeited to the United States.¹

Any vessel enrolled or licensed for the foreign or coasting trade on those frontiers, touching at any port in the British Provinces adjacent, and purchasing through the master any sea-stores for the use of the vessel, shall be forfeited if any other or greater quantity of dutiable articles shall be found on board such vessel than are specified, as required for the vessel's use, in the sworn report of the master to the collector of the first United States port to which he shall arrive, as required by law. And the "other and greater quantity" are forfeited as well as the vessel. (Sec. 3111.) If the master or owner of an American vessel shall willfully and knowingly fail to report and pay fifty *per centum ad valorem* duty on equipments or repairs obtained at a foreign port—such vessel, (having been licensed or enrolled for trade on those frontiers,) shall be forfeited. Sec. 3114.

There are other provisions authorizing proceedings *in rem* in the chapter of the Revised Statutes regulating our frontier commerce, but they are for the enforcement of liens, and, therefore, they belong to that part of our treatise devoted to Things Indebted.

There is a provision favoring products of Canada, New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island, in consideration of reciprocal favors from those colonies, should the Secretary of the Treasury, with the approval of the President, effect such mutual arrangement and embody them into his regulations.

Forfeitures under the Postal Laws are subjected to "the same

¹ R. S. § 3110.

proceedings" as are authorized in respect to goods, wares and merchandise forfeited for violation of the revenue laws; and all laws for the benefit and protection of custom officers making seizures for violating revenue laws are applicable to officers making seizures for the violation of the postal laws.¹

¹ R. S. § 3991.

CHAPTER XXIII.

FORFEITURES UNDER THE NAVIGATION LAWS.

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§ 204. **False Swearing to Obtain Registry.** For the offense of making a false oath to get a vessel registered, the swearing owner is liable to a personal action for the value of the ship, or he and his co-owners, (if he have such,) may lose the ship by condemnation *in rem* for his individual falsity. The government must elect between the two remedies. When the election is in favor of the proceeding against the vessel as fictitiously guilty, the alternative remedy is as though it were unwritten.

The false swearing to any of the required facts, that the ship was built in this country, or condemned as lawful prize, or declared forfeit for municipal mis-use, must be knowingly done to make the liability arise. The false oath to any required fact by a part owner who knew such statement to be untrue, renders the vessel, with tackle, apparel and furniture, liable to condemnation as a guilty thing.¹ And if the false oath be taken by an agent, the same choice of penalties belongs to the government.² This has always been deemed a very grave, offense. The vessel is supposed to act and speak, and report herself by the master, as Chief Justice MARSHALL said, when deciding

U. S. Rev. Stat., § 4143.

² U. S. Rev. Stat., § 4163.

upon the *Little Charles*.¹ It is in this sense that the fiction of guilt applies. Besides, the registry is of the vessel, and the oath intimately concerns the vessel. Though the decisions discuss minor matters with some differences, they all agree in imputing the falsity to the ship, when knowingly perpetrated, and upon forfeiture as the result.²

An interesting case arose under this act in the Circuit Court for the District of Maryland.³ One Brown by false oath had obtained the registry of the ship, *The Anthony Mangin*. The government libelled her in admiralty in the District Court, thus electing to proceed against the guilty thing, and giving up the other alternative of suing the owners *in personam* for the value of the vessel. Strangely enough, the court held that the guilty thing had been purged of the taint of forfeiture by a sale to third persons between the date of the offense and that of the government's election. This is precisely what the District Court really decided, when we reduce the decision to the proper language applicable to the system we are considering.

Now, the only proper course for the government to have pursued was to take the case up by appeal. Instead of doing that, the libellant acquiesced in the decision, under the qualification which the admiralty judge gave to his decree, "that this sentence was not intended to decide the question of forfeiture, but was founded on the alienation of the vessel before the forfeiture was claimed." Proctors on both sides agreed to this view, it seems. Yet it is perfectly clear that there was a judgment of acquittal of the accused thing. Whatever the grounds, tenable or untenable, the acquittal was *res judicata*. Of course the idea of the judge that a sale would relieve guilt, was altogether erroneous; and, as he had jurisdiction of the subject matter, his decision must stand, however poor its support, unless reversed on appeal.

¹ 1 Brock. 354.

² §§ 4142-3-4, 4163; *The Neptune*, 3 Wheat. 601; *The Anthony Mangin*, 2 Pet. Ad. 452; *The Schooner Active*, 1 Olc. Ad. 286; *Weston v. Penniman*, 1 Mason, 306; *The Fideliter*, 1 Deady,

620, 644; *United States v. Grundy & Thornburgh*, 3 Cr. 337. See *Id.* 356, note; *The Venus*, 8 Cr. 253, 276; *The Acorn*, 2 Abb. U. S. 434.

³ *United States v. Grundy & Thornburgh*, 3 Cr. 338.

§ 205. **Choice Between Remedies.** The United States, instead of appealing, brought a personal action against Grundy and Thornburgh, *assignees of Brown*, (who had become bankrupt,) for the value of this vessel which they had sold. This case was brought in the Circuit Court for Maryland, decided for defendants, and gave rise to a very interesting opinion by Chief Justice MARSHALL when before the Supreme Court. The judgment was affirmed: the court holding that under the registry act which we are considering, the absolute property in a vessel does not vest in the United States on the taking of the false oath, since some act must be done manifesting the intention of the government to take the vessel and not its value; that if the government elects to take the value, it can be recovered only in an action against the person who committed the offense, and the facts must be specially declared on.

But the United States did elect to proceed against the vessel when it libelled her as the guilty thing. Had there been judgment of condemnation the law of relation would have applied; and the forfeiture would have been found to have occurred at the time the offense was committed; the change of the vessel's *status* would have been of that date. The court admits the general rule that, at common law, "the doctrine of relation carries back the title to the commission of the offense;" but it is also evidently true that under the registry statute now being considered, sentence of condemnation would retroact to the offense so as to avoid all subsequent transfers of title; and that the alternate remedy offered by the statute cannot possibly affect the retroaction, after the election to proceed *in rem* has been made by the government.

A perfect defense to the action of the United States against Grundy and Thornburgh, assignees, for the value of the vessel, would have been the plea that the plaintiffs had, previous to the institution of the suit, elected to take the other remedy: the action *in rem* for forfeiture. The plea was not interposed, however. The Supreme Court decided against this personal action, but intimated that the action should have been against the false swearer only, for the value of the vessel. As he was insolvent, and his assignees had the money obtained by the

sale of the vessel, it would seem that the action would have been futile, though right enough, had not the government previously waived all right to proceed *in personam* against anybody.

The Supreme Court of New York, referring to the case of *United States v. Grundy and Thornburgh*, and recognizing its correctness, say: "The act of 1792 gives two remedies, the forfeiture of the vessel, or the value, to be recovered from the person who took the false oath; consequently, the remedy is at the election of the United States. The property, therefore, could not vest until the seizure. The act in relation to the case before us," (the non-intercourse act of 1809,) "affords but one remedy, and that is, the forfeiture of the vessel, so that the seizure is not necessary to change the property; the owner loses his right to it immediately after the commission of the act producing the forfeiture."¹

In the case of *The Venus*,² libelled as prize, the owners, Lenox and Maitland, had their claim rejected by the Supreme Court, on the ground that they had forfeited the ship by reason of a false oath made by Lenox in obtaining her registry, though no election to proceed against the vessel for that offense had ever been made by the government, no action *in rem* instituted for the purpose, no forfeiture ever declared. If the *Venus* was not condemnable as prize, the title of the claimants was good. If they had really lost it by forfeiture, the United States had really gained it: so the government was making prize of its own ship.

After rejecting the claim of Lenox and Maitland to the *Venus*, on the sole ground that they had previously forfeited the vessel to the United States, the Supreme Court proceeded to condemn as good prize of war, this vessel already the property of the United States, (by virtue of false swearing, without condemnation,) and really gave one-half to the captors and the other to the government; and, though most of the long opinion was on other matters, and though there was much dissent on other points, the judges seem to have been unanimous in the

¹ *Fontaine v. The Phoenix Ins. Co.*,

² *The Venus*, 3 Cr. 276.

11 Johns. 293, 300.

rejection of the claim to the vessel, on the one, distinct ground above stated.

This *Venus* case, with that of *The Anthony Mangin*,¹ have been doing duty as proof references long enough, and the profession have too long been obliged to look them over and find them unavailable.

The doctrine of the former, that false swearing to procure registry forfeits the vessel *ipso facto* without election and without suit; and the doctrine of the latter that sale before seizure purges the forfeiture for false swearing, even though the government should select that remedy and institute an action against the *guilty thing*, are plainly opposed to each other.² False oath as to repairs forfeits an enrolled vessel, in certain cases.³

§ 206. **Fraudulent Obtaining, or Using Registry, Enrollment, Etc.** "Whenever any certificate of registry, enrollment, or license, or other record or document granted in lieu thereof, to any vessel, is knowingly and fraudulently obtained or used for any vessel not entitled to the benefit thereof, such vessel, with her tackle, apparel and furniture, shall be liable to forfeiture."⁴

Liability to forfeiture is incurred, first, by the fraudulent obtaining; second, by the fraudulent use, of (1) a certificate of registry, or (2) enrollment, or (3) license, or (4) any document used instead of any one of these enumerated. The fraudulent obtaining, or use, must be with knowledge—an accompaniment of acts always presumed. Of course the burden of proof would be upon the party denying knowledge, after the affirmative establishment of the alleged fact of a fraudulent use or acquisition of the certificate.

There is no alternate penalty under this section; no choice of actions between that *in rem* and that *in personam*. But the penalty is peculiarly expressed: "*liability* to forfeiture." The framer of the section probably had not in mind the fact that the *status* of a thing is fixed by the offense committed in, with, or by it, and at the *time* of the commission, as a general rule,

¹ *The Anthony Mangin*, 2 Pet. Ad. 468.

Whisky, 1 Abbott's U. S. Rep. 93.

² R. S. § 4330.

³ *United States v. 56 Barrels of*

⁴ *United States Rev. Stat.*, § 4189.

in the system of procedure against property as guilty; but probably wrote the section under the idea that courts forfeit property by their decrees and sentences *in rem*. Whatever he thought, it is certain that only *liability to forfeiture* was immediately incurred by the wrongful acts designated; and, the curious might find good debatable ground as to what stage of proceedings, under this section, the *status* of an accused thing would be changed.

The twenty-seventh section of the Registry Act of December 31, 1792, expressed the penalty with perfect clearness: "If any certificate of registry or record shall be fraudulently or knowingly used for any ship or vessel not then entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States."

Under this, the *Neptune*¹ was condemned, for the use of a registry falsely obtained, at New Orleans, by one of the owners. It was held that the provisions of that section applied as well to vessels not previously registered according to law, as to those to which valid registers had been sometime previously granted: a matter of course. The offense is certainly a very grave one, and the courts have found no difficulty in pronouncing upon the *status* of ships and other vessels for the fraud of obtaining or using false registry,² or enrollment.³

§ 207. **Condemnation on Presumption.** Judge STORY condemned the *Luminary*⁴ on suspicion; or, rather, the court did through him, though Judge JOHNSON ably dissented. The *sylabus* of the reporter correctly states the decision, as follows: "Under the twenty-seventh section of the Registry Act of December 31, 1792, (1 Stat. at Large, 298,) circumstances of suspicion, sufficient, in the judgment of the court, to call for explanation, being shown, and the claimant having it in his power, by the production of documents, to make a clear case

¹ The *Neptune*, 3 Wh. 601.

² The *Mary Celeste*, 2 Low. 354; The *Mohawk*, 3 Wall. 566; United States *v.* Grundy & Thomburgh, 3 Cr. 337; The *Brig Burdett*, 9 Pet. 682; The *Anthony Mangin*, 2 Pet. Ad. 452; The *Brig Monte Christo*, 6

Ben. 148; The *Brig Victoria Perez*, 8 Ben. 109; The *Florenzo*, 1 Blatch. & H. 52.

³ R. S., § 4373, etc.; The *Schooner Two Friends*, 1 Gall. 118; The *Mohawk*, 3 Wall. 566.

⁴ The *Luminary*, 8 Wh. 407.

either for the government or himself, and refusing to produce these documents, the vessel was condemned." It will be seen that the text states a fact—"the vessel was condemned"—rather than any principle. It will be noticed that it is not stated that fraudulent use had been proved, or fraudulent acquisition of a certificate, and that the burden of proof had been thus thrown upon the claimant to show that he had not used or obtained "knowingly;" nor does it state that there had been interrogatories taken as confessed because of the claimant's refusal to answer; nor that a *subpœna duces tecum* had been served upon him, and he had failed to produce required papers. The truth seemed to be that he merely exercised the right of a litigant and the good sense of a sane man, to stand silent and let the libellant make out the case. The learned judge, after dwelling upon the suspicious circumstances, concludes: "The parties cannot complain that the court, in a case left so bare of all reasonable explanation, construe their silence into presumptive guilt." Judge JOHNSON, dissenting, says that if the evidence shows any violation of statute at all, it was violation not of section twenty-seven, but of other sections which provided for pecuniary penalties, and not for any forfeiture of the vessel at all.

The brig *Burdett*¹ was acquitted, notwithstanding the court thought the acts of the claimant suspicious, on the ground that the evidence does not authorize a forfeiture of the vessel: a very good ground.

§ 208. **Wrongful Use of Certificate.** A vessel, transferred at Havanna, was held to have lost her American character, and to be forfeitable for using her certificate of registry on the return voyage.² The *Mohawk*³ was condemned for procuring an enrollment, equivalent to a registry, under the Act of December 23, 1852; and the interest of the case turns upon the question whether this, and the act of 1792 and others mentioned, were to be construed as acts *in pari materia*; but we need not dwell upon this, since section 4189 of the Revised Statutes covers the fraudulent use of enrollment certificates as well as registries.⁴

¹ *The Brig Burdett*, 9 Pet. 691.

² *The Margaret*, 9 Wh. 421.

³ *The Mohawk*, 3 Wall. 566.

⁴ *The Neptune*, 3 Wheat. 601; *The*

§ 209. **Secret Sale of a Ship to a Foreigner.** Sale of a registered vessel to a foreigner, without reporting the transfer to the custom house as early as practicable, (that is, upon returning from a foreign voyage, if the transfer took place abroad,) forfeits the vessel.¹ The rule is the same if only a part of the ship be sold: such sale forfeits the whole. And the character of the sale need not be that of a strictly technical contract of sale, for the statute includes transfer "by way of trust, confidence or otherwise." The sale or transfer of the vessel does not alone constitute the offense for which it is forfeited, but that act coupled with the subsequent failure to report the transaction.² A resident part owner, ignorant of the sale, may defend his interest from condemnation, by pleading his want of knowledge, and proving it upon the trial. In such case, only the parts knowingly sold would be condemned.

"In case of alienation to a foreigner, the privileges of an American bottom are *ipso facto* forfeited, but in case of an alienation to a citizen, they are not forfeited until after she ought to have been registered anew, and the oath which entitles her to enter as an American bottom does not require such new register."³ But, though the forfeiting of the American character takes place *ipso facto* by sale to a foreigner, the forfeiting of the ship does not occur till, upon making entry at the home port afterwards, the fact of the sale is omitted from the required oath.

§ 210. **Lights, Fog Signals, Steering Rules, Wrecks, Etc.** Every vessel that shall be navigated without complying with the rules regulating lights, fog signals, steering and sailing, as prescribed by statute,⁴ is liable to a penalty of two hundred dollars, to be recovered by proceedings *in rem* as for debt due by the thing. By this contravention of law, the ship guiltily incurs the penalty; but the recovery of the specified pecuniary penalty is by process against her as a thing indebted rather than a thing guilty.

Luminary, 8 Id. 407; The Margaret,
9 Id. 421.

¹ Rev. Stat. § 4172.

² Rev Stat. 4173.

³ United States v. Willings, 4 Cr. 58.

⁴ United States Rev. Stat. §§ 4233,
4234.

For transporting wrecked property to foreign ports, from any wreck, from the sea, or from any keys or shoals, "within the jurisdiction of the United States, on the coast of Florida," the vessel is forfeited.¹

Penalties imposed upon captains of vessels and others, for violating the regulations concerning the transportation of passengers in merchant vessels, are made by section 4270 of the Revised Statutes, recoverable against the vessels by proceedings *in rem*; the law creating a lien upon them for the securing of such penalties. Such suit would not be against a guilty thing.

§ 211. **Licensed Vessel Going on a Foreign Voyage.** Vessels enrolled or licensed for domestic commerce, going on a foreign voyage without surrendering their enrollment or license to the collector of the district in which the port of departure is situated, and without obtaining registry authorizing the foreign trade, become "liable to seizure and forfeiture."² And the merchandise, imported in such vessels, incurs the same liability.³

The sloop *Active*, licensed for the fishing trade, left the port of New London, in the night, without a clearance; and she was seized and libelled, together with her cargo, and condemned; and the condemnation was affirmed in the Supreme Court with a slight modification.⁴ The sloop and cargo were libelled under the third section of the supplementary act to the act laying an embargo on all ships and vessels in the ports and harbors of the United States; and also under the thirty-second section of the act for enrolling and licensing ships. The Supreme Court held, through MARSHALL, C. J., that under the latter, both sloop and cargo were forfeited, except some goods that came under an exceptional proviso of the law.

By section 4347, merchandise imported in vessels that have

¹ United States Rev. Stat. § 4240.

² United States Rev. Stat. 4337.

³ The Sloop *Julia*, 1 Gall. 43; The Schooner *Friendship and Cargo*, Id. 45; The Sloop *Lark and Cargo*, Id. 55; The Boat *Eliza and Cargo*, 2 Gall. 4; The *Atlantic*, 1 Ware, 121.

⁴ The *Active*, 7 Cr. 165. For for-

feiture of fishing vessels for illicit trade and various other grounds, see R. S., §§ 4337, 4365, 4371, 4392. The Schooner *Parynthia Davis*, 1 Cliff. 532; The Schooner *Two Friends*, 1 Gall. 118; The *Ocean Spray*, 4 Saw. 105; 1 Story, 251; The Boat *Swallow*, 1 Ware, 21; The *Harriet*, Id. 343.

gone abroad without giving up enrollment and getting a certificate of registry, is forfeited; not the goods exported in such vessels.

This section is a re-enactment of the 8th section of the Act of February 18, 1793,¹ and the meaning of the words "foreign voyage" have given rise to an interesting exposition by Judge STORY, in the case of *Taber v. United States*.² Foreign voyage is held to be one in which there is a *terminus* in a port of a foreign nation. Licensed and enrolled vessels may go on whaling expeditions without violation of this statute. "Foreign voyage," says the judge, alluding to the use of the words as they occur in the act last above mentioned, "is used in contradistinction to fishing voyage and whaling voyage, expressing the clear sense of the Legislature that a fishing voyage or a whaling voyage is not a 'foreign voyage.' Nearly thirty years ago, this very question, under the Act, came before the court in the case of *The Three Brothers*:³ and it was then decided that a fishing vessel, which, according to the course and use of the fishing employment, went to a foreign port, if it was not for the purpose of trade there, was protected from seizure and forfeiture. In short, she was not engaged in a foreign voyage in the sense of the Act. Here, then, we have a clear expression of the Legislature, on the very point of the interpretation of the words 'foreign voyage.' Upon what grounds can this court, then, declare, that a whaling voyage is a foreign voyage, when Congress have used the words in contradistinction thereto, in an Act pointed to the very subject of the whale fisheries? * * Upon the whole, my judgment is that a whaling voyage is not, in the commercial sense of the words, deemed a foreign voyage, any more than a voyage in the cod or any other common fisheries: that the words 'foreign voyage' are in the common commercial sense applied to voyages to foreign countries, where the main *terminus* is a foreign port, for the purpose of exportation or importation in the course of trade; and that a voyage which is to be essentially performed upon the ocean, from its nature and objects, is not deemed foreign to the country."

¹ 1 Stat. L., p. 315.

Story, 1.

² *Taber et al. v. United States*, 1

³ *The Three Brothers*, 1 Gallis. 142.

Merchandise taken from one to another port of the United States, in a foreign vessel, is forfeited,¹ but there is an exception in favor of British ships authorized by the treaty of Washington to trade between our different ports on the St. Lawrence, the great lakes and the connecting rivers.

§ 212. **Unloading Imported Goods Without Reporting, Etc.** Forfeiture is the penalty of foreign grown or manufactured goods and distilled spirits, found on board or landed from a vessel such as is described in Revised Statutes, Section 4355, for the offense, on the part of the captain, of not delivering his manifest, or a certificate that he has no cargo, to the collector on arrival at port; and if there should be eight hundred dollars worth of such spirits and foreign grown or foreign made merchandise, the vessel too is forfeited. There is a pecuniary penalty also, though not bearing a lien upon the vessel, nor collectable of her.² For failure to report to the proper collector the arrival of foreign merchandise transported by permit over land, across certain states, within twenty-four hours; failure to deliver up permit, and failure to enter such merchandise, it shall be forfeited.³

Some watches having been transported from Maryland to Pennsylvania, across the State of Delaware, were libelled as goods of foreign make, conveyed without a permit, in contravention of the Act of Feb. 18, 1796, section 19, similar to the revised section above cited. They were condemned, and the Supreme Court, in affirming the decree, said, "The case stated, comes clearly within the 19th section of the Act of Congress, for enrolling and licensing vessels to be employed in the coasting trade and fisheries. The provisions of the section are salutary, and were made to guard against frauds upon the revenue, in the transportation of goods of foreign growth or manufacture, across the several states. * * * It is obvious that the claimant is an offender within the purview of the 19th section.

"Whenever a vessel, licensed for carrying on the fisheries, is

¹ Rev. Stat., § 4347.

² Rev. Stat., §§ 4355, 4356, 4359, 4360.
See R. S., § 4350, and *The Atlantic*, 1

Ware, 121; *United States v. Shackford*, Id. 171; *Phillips v. Ledley*, 1 Wash. C. C. 226.

³ Rev. Stat., §§ 4362, 4363.

found within three leagues of the coast, with merchandise of foreign growth or manufacture, exceeding the value of five hundred dollars, without having" permission to touch and trade at a foreign port, (as provided in Rev. Stat., section 4364,) "such vessel, together with the merchandise of foreign growth or manufacture, imported therein, shall be subject to seizure and forfeiture."¹

Foreign steamtug boats, for towing "documented" vessels of the United States, from one of our home ports to another, forfeit, for each offense, fifty cents per ton on the measurement of each offending tug, to be recovered by action against the thing.²

§ 213. **Trading Without Enrollment, Etc., When Unregistered.** This would be an action against a thing as indebted. Every unregistered vessel, of twenty tons burden, or upward, found trading or fishing without enrollment and license, (or one less than twenty tons but not less than five, without license,) having on board foreign goods or distilled spirits (other than sea stores,) shall be forfeited with her lading;³ though, if such ship has had license, which has expired at sea, she may avoid all liability to forfeiture by giving up the old and taking out a new license upon arrival at port. Section 4372.

A licensed vessel, transferred in whole or part, to one not a resident citizen of the United States, shall, together with her cargo, be forfeited. And if she engage in any other trade than that for which she is licensed, or is found with a forged or altered license, or with one granted to another vessel, the same penalty applies to her and her cargo,⁴ except that, if licensed for the mackerel fishery, she is not forfeitable if found catching cod or other fish. The courts, under the original statute, distinguished more particularly between the different branches of the fishing business.⁵ Goods, however, belonging not to the

¹ Rev. Stat., § 4365.

² Rev. Stat., § 4370.

³ Rev. Stat., § 4371; *The Schooner America*, 1 Gall. 231; *United States v. Burroughs*, 8 How. 1; *The Margaret Yates*, 22 Vt. 663.

⁴ Rev. Stat., § 4377; *The Mohawk*, 3 Wall. 566; *Phillips v. Ledley*, 1 Wash. C. C. 226; *The Schooner Two Friends*, 1 Gall. 118; *The Sloop Active*, 7 Cr. 100.

⁵ *The Schooner Nymph*. 1 Sumner, 516.

master, owner or mariners of such vessel, are exempt from forfeiture, if the duties have been paid. Section 4378. And this exemption applies to all the forfeitures under Title l. of the United States Revised Statutes.

Any master or owner of a steam vessel who shall refuse to repair his vessel; when legally required to do so by the local inspectors, and proceed to navigate her after having been so required, shall be liable to a fine of five hundred dollars, and to any damage which passengers may suffer in person or baggage, which liabilities are made recoverable of the ship by action *in rem*.¹

Cotton or hemp, carried on a passenger steamer, and not compactly pressed and thoroughly covered with bagging or similar fabric and bound with ropes or iron bands, shall be liable to a penalty of five dollars per bale by action directly against such goods. Section 4373. So, by section 4476, dangerous articles, such as gunpowder, nitro-glycerine, etc., not permitted, secured and conveyed according to statute provisions, may be proceeded against and forfeited; and, in addition, the master or person at fault, shall be deemed guilty of a misdemeanor and liable to a fine of \$2,000 as the *maximum*, recoverable in a criminal action against him personally.

Not to particularize here, since almost every offense of the kind differs in feature, it may be said generally that illegal traffic by a vessel in the coasting trade renders her forfeit.²

§ 214. **Damages to Passengers and Others.** Title lii. of the Revised Statutes, entitled, "Regulations of Steam Vessels," contains many provisions, such as fixing the number of passengers, keeping passenger list, providing fire-pumps and hose, transporting dangerous articles, mode of packing certain articles, keeping a watchman, providing fire extinguishers, wire teller-ropes, bell-pulls, boats, life-preservers, fire-buckets, axes, stairways, gangways, etc.: and "whenever damage is sustained by

¹ Rev. Stat., § 4454.

² The Sloop Active, 7 Cr. 100; The Schooner Two Friends, 1 Gall. 118; United States v. Sears et al., Id. 223; The Schooner Mars, Id. 237; The

Boat Eliza and Cargo, 2 Gall. 4; The Resolution and Cargo, Id. 47; The Schooner Nymph, 1 Sumner, 516; The Mohawk, 3 Wall. 566; The Nymph, 1 Ware, 257.

any passenger or his baggage, from explosion, fire, collision or other cause, the master and the owner of such vessel, or either of them, *and the vessel* shall be liable to each and every person so injured, to the full amount of damage, if it happens through any neglect or failure to comply with the provisions of this Title, or through known defects or imperfections of the steaming apparatus or the hull; and any person sustaining loss or injury through the carelessness, negligence or willful misconduct of any master, mate, etc." * * * may sue by personal action, etc.¹

The language is peculiar: only passengers can sue the ship *in rem*, though any person injured may have personal action against the ship's officers and owners or any one of them, for personal misconduct. The whole section is useless, except the part which authorizes the action against the vessel: for, without this section, "passengers" and "any person" might sue for injuries; and the former would not, any more than the latter, be obliged to take, as his measure of damages, the full amount of actual damages, but might, without this statute, recover exemplary damages where the facts might warrant such recovery.

The section is unobjectionable, so far as we have to do with it in following up our subject; and its authorization of personal actions will not, it is believed, limit by implication, the right of a passenger who may lose a leg by the explosion of nitroglycerine illegally transported, to the marketable value of the lost limb, in his personal action against the captain and owners of the vessel.

Would the action against the ship be against her as a thing *guilty* or as a thing *indebted*? Clearly, the latter, since the suit would be to collect damages—not to forfeit the vessel.²

¹ Rev. Stat. 4493.

² *Vide post*, Chapters on "Collision" and "Other Marine Torts."

CHAPTER XXIV.

FORFEITURE FOR PIRACY, AND BREACH OF NEUTRALITY.

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§ 215. **Statute Law of Piracy.** Vessels are guilty and forfeitable, under the "Regulations for the Suppression of Piracy,"¹ for the following offenses:

1 For being used in the committal of the crime of piracy as known to the law of nations.²

2. For being built, bought, held or fitted out for the purpose of being employed in piratical aggression, search, restraint, depredation, seizure or any act of piracy known to the law of nations.³

3. For, while armed, attempting to commit piracy upon any other vessel.⁴

Piracy is succinctly defined, by the law of nations, as robbery upon the seas. Sometimes it is said to be robbery or murder upon the seas. The definition of the law of nations has been adopted by the United States. The constitution⁵ provides that Congress shall have power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." Pursuant to this grant of power, Congress has followed the public law as piracy is therein understood, as appears in our first specification of the offenses under the statute, and has more particularly defined the term in the other specifications which we have mentioned above.

¹ Rev. Stat., Title xlviii., Chap. 8.

⁴ Id. § 4294.

² R. S. § 4293-5.

⁵ Art. 1, § 8, clause 10.

³ Id. § 4296.

The courts have had occasion to treat repeatedly of piracy, both as an offense which may be imputed to a ship under fiction of law, and as a personal crime. We have nothing to do with the decisions relating to the latter except so far as they illustrate the former. They will be considered in the order of the specifications made from the Title on Piracy in the Revised Statutes.

§ 216. **Piratical Use of Property.** Robbery, or forcible depredations upon the sea, *animo fitorandi*, is piracy by the law of nations, and therefore it is such under the act of Congress.¹ Though the robbery, if committed upon land, would be the crime known by that name, in the common law, yet the same act perpetrated upon the high seas would be piracy by an act of Congress recognizing and adopting the public law upon the subject.² And the general rule, that robbery on the seas is piracy, has no exception in favor of privateers, in the law of nations, in the common law or in any act of Congress.³ But courts will respect the belligerent rights of two foreign nations so long as their cruisers act within their commissions; even though one of the belligerents may not have been recognized by the political power of our own government, as a nation, the courts will not treat its privateers as pirates.⁴ But they would not respect the plea of having acted as belligerents, where a crew's conduct repels the idea of their having acted under any allegiance to any government.⁵ By becoming a pirate, a vessel loses her national character,⁶ and may be lawfully captured on the ocean by the ships of any nation.⁷

It was held in Palmer's case, above cited, that the crime of robbery, committed by a foreigner, on board of a foreign ship, was not piracy, though committed on the high seas; and not punishable by the courts of the United States. The decision

¹ Act of March 3, 1819, Chap. 76; United States v. Smith, 5 Wheat. 153; United States v. Pirates, Id. 184.

² 1 Stat. at Large, Chap. 36, § 8; The United States v. Palmer, 3 Wheat. 610.

³ United States v. Jones, 3 Wash. C. C. 209.

⁴ The Josefa Segunda, 5 Wheat. 338; United States v. Palmer, 3 Id. 610.

⁵ United States v. Pirates, 5 Wheat. 184.

⁶ Id.

⁷ The Marianna Flora, 11 Wheat. 1.

was based upon a construction of the Act of 1790;¹ but since the public law of piracy has been incorporated into our statute law, there can be no doubt that a foreign vessel could be condemned by our courts, should the crime of piracy be committed on board of it, at sea, by a person not a citizen of the United States.²

§ 217. **Vessels Built, Bought or Fitted for Such Use.** For being built, fitted out, etc., for the purpose of piracy, a vessel is forfeited under our second specification of piratical offenses. An American citizen incurs the guilt of piracy by fitting out a vessel in a port of the United States to cruise against a power at peace with this country; and, in such case, he is not protected by a privateer's commission from the opposite belligerent, so far as concerns his offenses against the United States.³ Where a crew acknowledge no allegiance to any country, and act in defiance of all law, and seize a vessel *animo furandi*, they will be held punishable by the courts of the United States.⁴ Under such circumstances, no respect will be paid to a commission from a subordinate province or a republic unknown to the nations of the earth.⁵ But a crew of a piratical vessel would not all be held pirates, where the beginning of the voyage was innocent; only such of them as actually became pirates, or willingly coöperated in piratical acts, would be held amenable.⁶

§ 218. **Attempting to Commit the Offense.** Attempt by an armed vessel to commit piracy, is piracy. Any armed vessel may be seized and brought in, which has attempted aggression, search, restraint, depredation or seizure upon any vessel; and it may be condemned and sold. If the crew are armed, and attempt to commit such aggression, etc., the vessel is as liable as though she had full armament.⁷ The innocence of the

¹ 1 Stat. at L. Chap. 36.

² See *United States v. Howard*, 3 Wash. C. C. 340; *United States v. Wiltberger*, 5 Wheat. 76; *United States v. Holmes*, Id. 412.

³ *United States v. Pirates*, 5 Wheat. 184.

⁴ *United States v. Klintock*, 5 Wh.

144, (expository of the Act of April 30, 1790, 1 Stat. at L. Chap. 36, § 8.)

⁵ Id.

⁶ *United States v. Gilbert*, 2 Sum. 19.

⁷ *United States v. Brig Malek Adel*, 2 How. 210.

owner, under such circumstances, will not save the ship from forfeiture.¹

The term "high seas," has been held, in construction of statutes, to include an open roadstead of a foreign country;² but not a bay that is entirely land-locked and enclosed by reefs.³

§ 219. **Public Law of Piracy.** Congress, under the power granted by the Constitution, having adopted the public law of piracy, we propose to devote some attention to that law, that we may the better understand the statutes and the authorized procedure thereunder.

Piracy has been defined, by different publicists, in a variety of phrases, but with one general significance. It is "robbery upon the high seas," "assault upon vessels navigated on the high seas, committed *animo furandi*;" "forcible felonious depredations upon the sea," etc., etc. *Pirate* has been defined "a sea thief;" "a sea rover;" "a sea malefactor;" "an enemy of all mankind," etc. It is said that the word was once used in a good sense, meaning an admiral or maritime knight.

Piracy was felony by the civil law;⁴ and it is the felonious character of acts upon the sea which constitutes them piracy, under the law of nations, as administered in the courts of different countries.

All nations have concurrent jurisdiction over piracies. It is municipal jurisdiction, however—not prize jurisdiction. When we say that the pirate is made, by his warlike avocation, *hostis humani generis*, we do not mean that the captor, or the captor's country, should treat him as an honorable enemy, entitled to the rights of war. We try him by indictment and petit jury, in a criminal court, as we would any other felon; and, because he is an enemy of all mankind, we say there is no country that can complain of us for so doing. We try his ship, not as a prize of war,⁵ but as we would any other guilty thing; we condemn

¹ *United States v. Brig Malek Adel*, 2 How. 210.

² *United States v. Pirates*, 5 Wh. 200; *United States v. Ross*, 1 Gal. 624.

³ *United States v. Robinson*, 4 Mason, 307.

⁴ Grotius, lib. 3, ch. 3, 9; lib. 2, ch. 17, 18, 21; Bynkershoek, lib. 1, ch. 17, verbo "*De Piraticâ*;" Ortolan, Tit. 1, ch. 12, verbo "*Des Pirates*."

⁵ *The Hercules*, 2 Dodson, 353-375; *Manro v. Almeida*, 10 Wheat. 473.

her, if found guilty, after a fair civil trial in the admiralty court, sell her in open market, and then distribute the proceeds like those of a prize vessel, if the capture has been by our navy, since the statute so requires.

LORD STOWELL says: "With professed pirates there is no state of peace. They are the enemies of any country, and at all times; and are therefore subject to the extreme rights of war,"¹ but a pirate has not privileges of war as against others while others have all such rights against him. It is indeed misleading to speak of the rights against him as those of war; they are rather those of sovereign government against him to punish him as though he were a criminal subject, without regard to the place of arrest or his previous nationality.

SIR LEOLINE JENKINS says of pirates, they are "enemies not of one nation or of one sort of people only, but of all mankind. They are outlawed, as I may say, by the laws of nations; that is, out of the protection of all princes and of all laws whatsoever. Everybody is commissioned, and is to be armed against them, as against rebels and traitors, to subdue and root them out."²

And because everybody is thus commissioned, it follows that though the offense of piracy forfeits the pirate vessel, yet the forfeiture transfers *ipso facto* no right of property to any particular person or nation, prior to seizure or capture. It is thus written in *The Sea Laws, Discourse I.*: "If a ship commits piracy, by reason of which she becomes forfeited, if, before seizure she be *bona fide* sold, the property shall not be questioned, nor the owner divested of the same."

Here is a general exception to the ancient law of retroaction; but the reason is peculiar. It applies only to circumstances where the forfeiture is not in favor of any known person or government. It is therefore exceptional to the general rule where the offense consists of the contravention of some statute of a particular country, and gives immediately a *jus in re* to the government of that country.

§ 220. Proceedings on the Instance Side of the Admiralty.

¹ *Le Louis*, 2 *Dodson*, 244, 246.

² *Life of Sir L. Jenkins*, vol. 1, p. 86.

Now it must not be concluded that, because a pirate is said to be the enemy of all nations, he is to be treated, after capture, according to the laws of war; nor that a piratical vessel, after capture, is to be proceeded against as a hostile rather than a guilty thing.¹ A very ludicrous mistake relating to the enemy character of pirates is thus recorded of Sir THOMAS PINFOLD early in the reign of William of Orange. There was a question as to the piratical character of privateers commissioned by James II. to make war against William. The chronicler records the opinion as follows: "Then Sir THOMAS PINFOLD said it was impossible they should be pyrates, for a pyrate was *hostis humani generis*, but they were not enemies to all mankind; therefore they could not be pyrates. Upon which all smiled, and one of the lords asked him *Whether there ever was any such thing as a pyrate, if none could be a pyrate but he that was actually in war with all mankind?* To which he did not reply, but only repeated what he had said before." And the recorder adds, "*Hostis humani generis* is neither a definition, nor so much as a description of a pyrate, but a rhetorical invective to show the odiousness of that crime."²

A ship is not a hostile thing as captured from an enemy of mankind, but is guilty for having been used in piracy, and therefore triable in the admiralty courts on the instance—not on the prize side.

While such guilty ships are *justiciable* by any nation capturing them, no nation is bound, by the international law of prize, to examine a prize crew for evidence, to take the testimony *in preparatorio* and preserve it for the inspection of other powers, to allow a review of the procedure by other governments which may think themselves wronged, and to comply with all the various usages in the adjudication of sea captures during war. On the contrary, the United States may libel and try a pirate ship captured on the Mediterranean sea, just as they would try a smuggling skiff caught on the Detroit river, so far as forms and the rights of other nations are concerned.

¹ The Hercules, 2 Dodson, 353-375; ² Tindal's Essay.
Munro v. Almeida, 10 Wheat. 473.

A pirate ship is guilty under the law of nations, but is to be tried not in a court of nations but that of the country to which she is brought; and, though the Revised Statutes require that proceedings for condemnation must be in admiralty, that is simply because the captures or seizures are upon the sea. When the seizure is upon land, for fitting out a vessel, the applicable law is municipal; when the seizure is made anywhere, on sea or land, the law of the procedure and adjudication is municipal.

If it be argued that naval seizures of pirate ships are subject to the prize rules in the distribution of the proceeds of the *res*, and that the case is therefore one of prize, we answer that this is a mere municipal regulation for the rewarding of the captors, and that such distribution is not by virtue of the prize act, but of the title on piracy which we are considering.¹ Besides, when the seizure is made by the marshal of a district or the collector of a port, the case itself is nowise different from one under a naval capture, from its inception to condemnation or restoration; and, when a pirate vessel has been seized by such civil officer, the prize rule of distribution is not applied by the statute.

It will be seen, in the next chapter, that slave-trading vessels are tried just as pirate vessels, with the same distinction between naval and civil seizures in the matter of the distribution of the proceeds.

§ 221. **Breach of Neutrality.** Every vessel, with all its materials, arms, ammunition and stores procured for the building and equipment of it, shall be forfeited, one-half to the United States and the other to the informer, for any one of the following offenses:

1. For being fitted out and armed for the service of any foreign power to cruise or commit hostilities against any State, colony, prince or people with whom the United States are at peace.

2. For attempt to fit out and arm for such purpose by any person.

¹ The Palmyra, 10 Wheat. 1.

3. For procuring to be fitted out and armed for such purpose, by any person.

4. For any person's being knowingly concerned in the furnishing, fitting out, and arming of the vessel, for such purpose.

5. For any person's issuing or delivering a commission, within the jurisdiction of the United States, for any vessel to the intent that she may be employed for such purpose.¹

Most of the statute in which this provision is found, appertains to personal prosecutions for the violation of neutrality; and, in such prosecutions, the forfeiture of the vessel, etc., may, perhaps, be pronounced as a part of the penalty. But that Congress meant that proceedings *in rem* might be instituted against the vessel, appears from the eighth section of the act respecting the seizure of such vessel with her prizes, and the restoration of such prizes "in the cases in which restoration shall be adjudged."

The prizes, so called, illegally captured by offenders, are not prizes in the sense of the law of nations; they are not hostile things in relation to the United States, but are adjudicated merely for the purpose of doing justice to their wronged owners by restoring them; *a piratis aut latronibus capti dominium non mutant*; while the vessel is clearly a thing guilty when she has contravened the neutrality laws, and is not enemy property, unless owned by insurgent enemies.

There has been some judicial interpretation of this act, though none requiring any special discussion in this connection.²

The Chapman having been fitted out within a loyal State, during the insurrection in this country, for the purpose of cruising against the commerce of the United States, under a letter of marque issued by J. Davis, was libeled and condemned on the instance side of the admiralty court, and the seizing naval officers were denied the moiety: the court holding them not entitled to it either under the law of prize or the acts against piracy.³

¹ Rev. Stat., § 5283.

² *The Estrella*, 4 Wh. 298; *The Gran Para*, 7 Id. 471; *The Santa Ma-*

ria, Id. 490; *The Monte Allegre*, Id. 520.

³ *Proceeds of the Chapman*, 4 Sawyer, 501.

CHAPTER XXV.

SLAVE TRADING.

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§ 222. **Statute Law of Slave-Trading.** Vessels are guilty and forfeited under the slave-trade laws, for the following offenses:

1 For being employed in the slave-trade; receiving colored persons at sea or in a foreign country to be held or sold as slaves.¹

2. For taking on board at any place, or transporting to or from any place, any colored person for the purpose of selling such person as a slave, if done by a citizen of the United States.²

3. For hovering on the United States coasts, or being found in any river, port, bay, or harbor of this country, or upon the seas within our jurisdiction, with a colored person on board designed for slavery or to be landed for sale as a slave.³

4. For sailing from the United States for the purpose of slave-trading.⁴

5. For being built, fitted out, equipped, laden or otherwise prepared, within the United States, to bring colored persons hither from a foreign country to be held or sold as slaves.⁵

6. Any interest of a citizen or resident of the United States in a slave-trading vessel is forfeited for being held for the unlawful purpose of slave-trading.⁶

¹ R. S. § 5553.

² R. S. § 5554.

³ R. S. § 5555.

⁴ R. S. § 5551.

⁵ Id.

⁶ R. S. § 5556.

In addition to the vessel and her tackle, apparel and furniture, the lading or cargo also is forfeited, for the first, third, fourth and fifth offenses above named. For the first-named offense, however, the forfeiture of the cargo is limited to that found on board or imported on the trading voyage for which the vessel is seized.

§ 223. **Vessels Employed in the Trade.** The first offense is not confined to the transportation of slaves, but includes employment in the business of the slave-trade; and a vessel caught in such nefarious avocation may be declared forfeited, though she have not yet taken on board slaves, or negroes intended to be sold as slaves.¹ And, if persons have been transported to be sold as slaves, the offense is complete before the sale.²

Where the master had knowledge that two slaves were brought on board his vessel by the supercargo to be transported to Brazil; and where they were so transported, the vessel was pronounced forfeited.³ But it was held that a vessel was not liable to condemnation for transporting slaves from the United States to Europe, and bringing them back again to be continued in a state of slavery:⁴ happily, our courts will now no longer have occasion for such ruling, and they will not need this precedent. A similar decision, based upon the verbiage of the Act of 1818, (from which the section of Revised Statutes on which this offense rests, was taken,) is to the effect that persons of color domiciled in the United States, might be brought back to this country after a temporary stay abroad, and held to slavery, without any liability of the ship thus importing them.⁵

§ 224. **Taking on Board or Transporting to Enslave, and Other Offenses.** The second offense noted under the Title lxxi, of the Revised Statutes, "The Slave Trade," would have included the case last cited from Newberry's Reports, had Sec. 5554, (from the Act of March 22, 1794,) included "holding"

¹ The *Alexander*, 3 Mason, 175; *United States v. The Catherine*, 2 Paine, 721.

² *United States v. Smith*, 4 Day, (Ct.) 121.

³ The *Porpoise*, 2 Curt. 307.

⁴ *United States v. Skiddy*, 11 Pet. 73.

⁵ The *Ohio*, 1 Newb. Adm. 409.

as well as "selling" an imported person as a slave, by a citizen of the United States. A slave was taken upon the ship at Baltimore, by an American master, as his slave; and, as such, brought back on the return voyage from abroad.

The third offense, hovering on the coasts with intent to land slaves, has been held sufficient for the declaration of the forfeiture of the vessel.¹

The fourth, sailing from the United States for the purpose of slave-trading, is not committed till the vessel sails out of port.²

But for the fifth offense, a seizure may be made before she leaves port, and "as soon as the intention of preparing or of causing to sail, is manifest;"³ though we should prefer to amend the ruling by saying as soon as the preparing with the intention, etc., is manifest. It has been held, that the equipping of a vessel, in the United States, to transport slaves, from one foreign port to another *as passengers*, is not the committal of this offense.⁴ Under the old act which forbade building, fitting, equipping, loading, preparing or sailing, any vessel for the slave trade, the word "building" was omitted in the part of the act which prescribed the forfeiture, and the language was, "if any vessel shall be so fitted out or caused to sail as aforesaid, such vessel, etc., shall be forfeited;" so it was held that "fitting out" did not include "building;" and that, though the *Caroline* had been *built* for slave-trading, she could not be forfeited for that.⁵ The Revised Statutes include the word held necessary to forfeiture under such circumstances, should they recur: we need not comment, therefore.

The preparation of the vessel for the trade need not be complete to render her forfeit.⁶

A vessel about to engage in the slave trade, may have her disposition inferred from suspicious circumstances, when they are explainable by the captain and claimants, if susceptible of

¹ United States v. Preston, 3 Pet. 65.

² United States v. La Coste, 2 Mason, 129.

³ The Emily and The Caroline, 9 Wh. 381.

⁴ The Tryphenia v. Harrison, 1 Wash. C. C. 522.

⁵ The Caroline, 1 Brock. 384.

⁶ The Wanderer, 1 Sprague, 515; The Slaver Reindeer, 2 Wall. 383; The Emily and Caroline, 9 Wh. 381; The Plattsburgh, 10 Wh. 133.

a satisfactory elucidation, and they fail to explain and exculpate.¹

§ 225. **Public Law of Slave-Trading.** The general offense of slave-trading is such by international law. It covers the first two specifications of it with which we commenced this chapter: 1, Being employed in the slave trade; in receiving on board of a vessel persons at sea or in a foreign country, to be held or sold as slaves; and 2, Taking on board at any place, or transporting to or from any place, any person for the purpose of selling him as a slave. The statute is confined to negroes, mulattoes and colored persons generally; and limits the second specification to such offense when done by a citizen of the United States.

But there seems to be no room for doubt that the general offense of slave-trading as known to international law, is committed whether white or black persons be the victims of the traffic, and without regard to the nationality of the offender or offending vessel.

It is because the offense is one recognized by international law, that our admiralty courts have cognizance of it when committed beyond the ordinary territorial jurisdiction of the United States. Whether committed on the high seas or in foreign ports, the offense may be punished by any nation; the vessel may be pronounced forfeited; and there may be personal punishment of the offenders by indictment and criminal trial. The jurisdiction of all nations is concurrent upon the ocean and all great seas, for the purpose of suppressing the slave traffic, and for that of seizing offending ships and persons, trying them and condemning them if guilty. Treaties have been entered into by all the great powers, which fully recognize such jurisdiction. By the Treaty of Paris of 1814, eight of the principal nations of Europe engaged mutually to put down the slave trade; and this has been followed by many treaties, in

¹The *Slaver Kate*, 2 Wall. 350; The *Slaver Sarah*, Id. 366; The *Slaver Weathergage*, Id. 375; The *Slaver Reindeer*, Id. 383. See further, The *Bark Isla de Cuba*, 2 Cliff. 295; The *Isla de Cuba*, 2 Sprague, 26; The *Schooner Anne and Cargo*, Taney, 413; The *Brig Caroline*, 7 Cr 496; The *Antelope*, 10 Wheat. 66.

which the right of search has been conceded between some of the powers, (though perhaps not yet fully established) for the purpose of ascertaining whether slaves are being transported. At the Congress of Vienna, in 1815, the abolition of the slave trade was formally declared to be a principle of public law; and this was reiterated at the Congress of Aix-la-Chapelle, in 1818, and that of Verona, in 1822; and, since these dates, the principle has been admitted by all the Christian nations and several others in their special treaties with Great Britain. The British parliament declared, in 1845, that the courts of admiralty had jurisdiction over Brazilian slaves; but Brazil did not then concede that such right existed. There has been much advance since, on this subject, not only by the last mentioned power, but by Spain and the United States, and other nations that were then slave-holding.

It is not proposed here to enumerate the various treaties, nor to give a history of the growth of this principle of public law, both as to the character of slave-trading, and the concurrent jurisdiction of all nations, over the seas, for its suppression. The whole question, so far as it concerns the *jus gentium*, resolves itself into this: Is slave-trading piracy?

§ 226. **Slave-trading Considered as Piracy.** It was classified with piracy by the convention of 1841, in which Austria, Prussia and Russia participated. Great Britain had made twenty-four treaties, as early as 1850, with various civilized nations for the suppression of the trade, some of which authorized the adjudication of captures in the country of the captor, though made in time of peace, just as though the vessel were piratical; and yet she did not nominally hold slave-trading to be piracy *jure gentium*. The idea was prevalent, (and such great jurists as Lord STOWELL and Lord MANSFIELD entertained it,) that slavery might exist by the municipal law of any country. The enlightened opinion of the present day can draw no distinction between the slavery of a black man and that of a white man; and to hold that any civilized nation may keep the latter in bondage is repulsive to the spirit of public law. Even the civil law, which attempted to recognize slavery, allowed the slave one right: that of suing for his freedom. As plaintiff

in such suit, he was recognized as a person. The presumption of liberty was with him. The defendant must produce his title; but how could it be received in evidence against the plaintiff's objection that he was not a party to the contract which the bill of sale is offered to support? He may have been the subject of the contract; but, not having been a party to it, the title is inadmissible against him, by the rules of evidence. Again, slaves are held amenable to crime; to the crime of treason for instance. Treason is an offense against allegiance. The duty of allegiance is based upon the right of protection. Protection is what? Life, *liberty* and property. Many illustrations might readily be given to show that slavery cannot possibly be made to harmonize with any system of jurisprudence. Public laws cannot recognize any local, municipal statutes which purport to create slavery, if any such have ever existed. Certainly we know of none such in the United States, or of any of the several States of the Union. Slavery formerly existed in several of these States *de facto*, but was it ever created in any of them by statute? There were statutes regulating it, but would any of them have been held constitutional were white men the subjects of the slavery?

Bynkershoek thought nations might make slaves of captives, but he said, (writing a hundred and fifty years ago,) that the practice had become obsolete among Christians. Grotius denies the right. Lord STOWELL thought that trading in slaves, so far from being piracy, was not legally criminal; but he says "No nation can privilege itself to commit a crime against the law of nations by a mere municipal regulation of its own;"¹ and, he admits slavery to be a crime.² Lord MANSFIELD said of slavery, "It is so odious that nothing can support it but positive law;"³ but would he have held that there could be any positive English law to uphold it, against natural right, were the subject of the slavery an Englishman? Chief Justice BEST said of some captured slaves, in the case of the Creole, "When they got out of the territory where they became slaves to the

¹ Le Louis, 2 Dodson's Adm. R. 251.

³ Howell's State Trials, Vol. xx.,

² The Slave Grace, 2 Haggard's Ad. R. 128. p. 82.

plaintiff, and out of his power and control, they were, by the general law of nature, made free, unless they were slaves by the particular law of the place where the defendant received them." How could they legally be slaves in any place, if "the general law of nature" makes slaves free?

Since slave-trading is an offense recognized by international law, and, indeed, now by the law of nations, the basis upon which the traffic rests, slavery itself, ought to be so recognized.

The ground on which rests the jurisdiction of the United States over this offense when committed abroad or upon the high seas, is the piratical character of the offense. Only in cases of piracy and slave-trading does such jurisdiction exist in time of peace. It is by the general assent of nations that ships engaged in such business may be captured anywhere, and tried in the courts of the captor, whatever the pretended nationality of the outlaws. As piracy is defined to be robbery upon the seas, so slave-trading is robbery upon the seas or in ports of barbarians; robbery of the liberty and persons of the subjects of the traffic. If no publicists and no treaty had ever told us that slave-trading is piracy, we might justly have inferred the fact from the character of the calling.

§ 227. **Captured Slavers Tried on the Instance Side of Admiralty.** Slavers, like pirate ships, are to be tried in the admiralty court, but on the instance side. Figuratively they may be said to be hostile to all mankind, but their legal character is that of guilt, not hostility. If guilty of the piratical offense of slave-trading, it matters not by whom they are owned; while, in case of a hostile thing, the ownership is the vital matter. Judged by public law, they are tried by procedure prescribed by municipal law.

When a ship has not incurred guilt under public law, but under the statute forbidding its being built, fitted out, equipped, laden or otherwise prepared for slave-trading, the procedure against her is precisely the same as though she were guilty by public law and captured upon the high seas by a naval vessel; and no one would contend that, when guilty for being so prepared, and when seized in one of our own ports, she should be tried on the prize side. Naval captors get their share in the

distribution of slavers, under the title on slave-trading—not that of prize, in the Revised Statutes. The provision merely refers to the prize method of distribution. Such method is not adopted when civil persons make the seizure, but the proceedings in the case are the same as though instituted after a naval capture.

Argument by analogy may be drawn from the criminal trials against slave-traders and pirates. They are treated as criminals against sovereign authority, reaching out over all seas by consent of nations: so slavers and pirate ships are amenable to the sovereign authority for their offenses committed on the ocean or in distant, barbarous ports, by such general consent of all the civilized powers; and precisely as though such offenses had been committed within our own ordinary territorial jurisdiction.

The personal trial of slave-trading or piratical criminals is in the circuit court, which has no original prize jurisdiction; and, if, in personal trials, prisoners not ordinarily subject to the jurisdiction of the country, may be tried, condemned and hung, there is no jurisdictional reason why the proceeding *in rem* against slavers and pirate vessels should not be in the courts of the country instead of those of nations. The only reason why the admiralty court is designated in the act is that the captures at sea, or on navigable waters, renders the *res* justiciable in that forum, just as is a vessel taken on such waters for violation of the revenue laws.

The form of trial, as it is not different from the general procedure described in the First Book, concerning the *actio in rem* in general, need not be expatiated upon in this place.

CHAPTER XXVI.

PROPERTY LIABLE FOR IMMORAL USES.

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§ 228. **Forfeiture of Obscene Books, Etc., by the action in rem.** The right of government “to promote the general welfare,” is universally conceded. The promotion of it is declared to be one of the objects of the formation and establishment of the Federal Constitution, as expressed in the preamble. So far as authorized expressly or impliedly by the Constitution, Congress may legislate for the general welfare. And, under the police power, Congress may provide for the suppression of nuisances, when coming under the Federal jurisdiction, and also for the forfeiture or destruction of immoral and dangerous things. Under the police power of the several States, too, immoral, dangerous and nuisance things may be forfeited and destroyed, within State jurisdiction.

Congress has made forfeitable, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, representation, figure, image, casting, instrument and any other article of an immoral nature; and also any medicine or other article for the prevention of conception or for causing unlawful abortion. The forfeiture is for the offense of being imported into the United States from a foreign country;¹—an offense clearly within the Federal jurisdiction.

If any such obscene or immoral article shall have been

¹ Revised Stat. U. S., § 2491; Act 3 Mar. 1873, 17 Stat. at L., p. 598; Mar. 2, 1857, 11 Stat. at L., p. 168.

invoiced with other goods, or imported in package with other goods, so as to compose a part of such invoice or package, such other goods are also forfeited.

There is an exception made in favor of drugs or medicines imported in bulk and not put up for the immoral purposes mentioned, though susceptible of such abuse.

The method of procedure against the offensive things is as follows: An affidavit must be made, setting forth the importation of the obscene article or the article intended for such immoral use, based upon the knowledge of the affiant, or simply upon his belief, if he state the grounds of his conviction. Upon presentation of this affidavit to the judge of the district or circuit court of the United States, in the district where such offending thing is, the judge, if satisfied that there is sufficient reason for so doing, may issue a warrant to the marshal or a deputy, directing him to search for and seize the forfeited thing, and make due return of his action to the court.¹

§ 229. **The Object: The Destruction of the Thing.** The object of the proceedings, to be instituted by the district attorney, is that the obscene or immoral importation may be "condemned and destroyed." The statute requires that the proceedings shall be conducted in the same manner as in other cases of municipal seizure, with the same right of appeal or writ of error; they must therefore be *in rem*, with the usual notice to all persons, and the right of all to claim or intervene. But there is necessarily this difference: the condemnation does not give the government the right to retain or sell the obscene or immoral *res*, but only the right and duty to destroy it. It is otherwise with the goods that may be condemned with it because of their forming a part of the package or invoice. Such goods may be retained by the government under the new title from forfeiture, or sold under such title.

The statute gives concurrent jurisdiction to the circuit and district court; but under Title xiii., on "The Judiciary," section 563, it is provided that the district courts shall have jurisdiction * * * of all suits for penalties and forfeitures incurred

¹ Rev. Stat., § 2492.

under any law of the United States;¹ and section 629, paragraph 4, expressly excepts suits for penalties and forfeitures from the original circuit court jurisdiction. Construing the statute under consideration with the sections from the judiciary title above cited, (all of which are now comprised in the one act which includes the whole Revised Statutes,) we must conclude that the original jurisdiction of those courts is concurrent over cases *in rem* for the destruction of obscene and immoral things imported in contravention of law, and also over the goods invoiced or packed with them.

When the seizure is made on navigable waters, the case becomes one of admiralty, and should be brought in the district court; but, when the seizure is made on land, it seems that the suit may be instituted in either court. Writ of error would lie in the latter case, as it would be at law, while appeal would be the method of taking up the admiralty case; hence the alternate forms mentioned in the statute.

§ 230. **Right of the Several States to the Direct Action against Nuisances and Property Immorally used.** The several States abate nuisances by personal actions, suits in chancery, writs of injunction and criminal prosecution; and there are actions at law for damages. There is a very common remedy, the indictment of the nuisance. The old writ of nuisance has grown into disfavor. But we think there can be no doubt that proceedings *in rem* would be the most effective, and altogether the best remedy that the States could adopt for the destruction of nuisances; or for their abatement by condemnation sale and removal where they are of such a nature as to render their destruction unnecessary. A thing may be a nuisance by reason of its location, so that removal would be remedial.

If the *actio in rem* is the best remedy, have the several States the right to employ it? There seems to be no argument to the contrary. Chief Justice SHAW, of Massachusetts, said:² "We have no doubt that it is competent for the legislature to declare the possession of certain articles of property, either absolutely,

¹ *Ketland v. The Cassius*, 2 Dal. 365; *Hall v. Warren*, 2 McLean, 332.

² *Fisher v. McGirr et al.*, 1 Gray, 28.

or when held in particular places, and under particular circumstances, to be unlawful, because they would be injurious, dangerous or noxious; and by due process of law, *by proceedings in rem*, to provide both for the abatement of the nuisance and the punishment of the offender, by the seizure and confiscation of the property, by the removal, sale or destruction of the noxious articles. Therefore, as well to abate the nuisance, as to punish the offending and careless owner, the property may be justly declared forfeited, and either sold for the public benefit or destroyed, as the circumstances of the case may require, and the wisdom of the legislature may direct. Besides, the actual seizure of the property, intended to be offensively used, may be effected, when it would not be practicable to detect and punish the offender personally."

This opinion of the distinguished judge is approved no further than the remark on the abatement and destruction of the nuisance; for certainly that part of it is unsound which states that one of the objects of the proceedings *in rem* against the nuisance, is "the punishment of the offender." The offender's loss is incidental; he cannot be said to be punished by a civil proceeding resulting in the forfeiture of property which cannot be pleaded in bar to any subsequent criminal prosecution against him by indictment or information; or by a civil proceeding resulting in a decree of restoration, which cannot be made the basis of the plea *autrefois acquit* to any subsequent criminal prosecution of the offender.

The statutes provide for criminal prosecution, prescribe penalties, and forbid the carrying of obscene matter in the mails;¹ but such prosecutions are distinct from the proceedings *in rem* for the purpose of destroying the obnoxious things.

§ 231. **Suppression of Gambling, Tippling and other Immoral Establishments by Proceedings in rem, suggested.** It would greatly conduce to the enforcement of the laws, in the several States, if proceedings *in rem* against guilty things were made more general. The legislature of a State has undoubted

¹ R. S., §§ 3893, 3894; United States *v. Bennett*, 16 Blatchf. 338; United States *v. Whittier*, 5 Dillon, 35.

power to declare gambling houses and paraphernalia; tippling houses and their furniture, bottles, liquors, etc.; immoral establishments of any kind, *guilty things*; and to provide for their condemnation by proceedings *in rem*. Where there are prohibitory laws against gambling houses, drinking saloons and other immoral *rendezvous*, there could be found no better method of suppressing such nuisances than by proceedings directly against the offending things themselves. And if, as is not uncommon in the methods of the Federal government, one-fourth or a moiety of the condemned property should inure to the person who may assist the prosecuting attorney in the execution of the law, by furnishing the facts for the libel, we should find less complaint than heretofore, of the difficulty of executing prohibitory laws.

The statistics sometimes paraded, of the increase of drunkenness and the number of arrests for a given time, under a State law prohibiting drinking shambles, as compared with periods of like length under the license system, simply show that the remedy resorted to has not proved effective; though, we frankly admit, that the experiments of executing prohibitory laws by personal prosecutions, has never been fairly tried, since the executive officers have not always been morally efficient; and since the experiments have always been of too short duration. Any wise legislator should expect that a prohibitory law (for the suppression of drinking saloons, for instance,) would be likely to encounter energetic and extraordinary opposition for the first five or ten years of its existence, since the ministers of evil are always the more active the more they are likely to be foiled in their evil purposes; and he is a foolish law-giver who would repeal a law as ineffective and inoperative, before its execution and effect have been fairly tried. The Maine experiment was the most protracted, yet too brief to prove whether or not the prohibitory law was a good one of one State. If that effort had failed altogether, it would be illogical—certainly not Baconian—to infer a rule from a single fact. When was the inductive system thus shorn? And, if the Massachusetts and one or two other experiments had really been fairly tried and failed, the facts would have been too few for the logical result claimed.

The United States Government having set the example by prosecuting illicit distilleries and various other offending things by means of the action *in rem*, the several States could find no constitutional impediment to the enacting of similar laws, and the executing of them by the like remedy. No State constitution, by spirit or letter, inhibits such legislation or such means of enforcing it. And Massachusetts has set the example of trying the method now suggested.¹

A proceeding *in rem* for the forfeiture of certain malt liquors, under the State prohibitory law of 1869, having resulted in their condemnation, the Supreme Court of the United States held the law, including this method by a State, to be constitutional, and affirmed the decree in the first case just above cited, lodging the right of prohibition upon the police power of the States. The Iowa statute for proceeding *in rem* against drinking houses has been sustained.²

There are many cases reported, of prosecutions under prohibitory laws, especially in the Maine reports; but they are personal actions. So also in New York, Pennsylvania, West Virginia, North Carolina, Georgia, Alabama, Louisiana, Texas, Missouri, Kansas, Kentucky, Tennessee, Ohio, Indiana, Illinois, Iowa, Colorado, Dakota Territory, and also in Massachusetts, there are personal cases reported, not confined to prohibitory laws in the full sense, but concerning the partial suppression or regulation of the sale.

It is suggested that the several States, as well as the general government, might find it expedient to extend the application of the proceeding *in rem* to lottery establishments which are so detrimental to the public welfare. And the latter might find this the most efficient means of suppressing polygamy, now grown to be a widespread crime in some parts of the country. If the buildings and ground upon which this crime is com-

¹ *Beer Co. v. Massachusetts*, (7 Otto,) 97 U. S. 25; *Acts of Mass. 1869*, c. 415; *Commonwealth v. Intoxicating Liquors*, 128 Mass. 72.

² *Our House No. 2 v. State*, 4 Greene,

172; *Bartemeyer v. Iowa*, 18 Wall. 129; *Santo v. State*, 2 Iowa, 165. See *State v. Wheeler*, 25 Conn. 290; *Commonwealth v. Matthews*, 129 Mass. 485, 487.

mitted were made liable to seizure and condemnation by proceedings *in rem*, it would tend to suppress it by deterring real estate owners from allowing their property to be thus prostituted.

CHAPTER XXVII.

FORFEITURE FOR NON-PAYMENT OF TAXES.

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§ 232. The Right to Collect Taxes is not *jus in re* but *ad rem*.

Several of the States have enacted laws authorizing the forfeiture of property for failure to pay taxes; and it is the practice, under such statutes, to divest the titles of real estate owners of their lands when delinquent as to their tax assessments. Under cover of such statutes, executive and mere ministerial officers, without any judicial action whatever, take possession of lands under those circumstances, and hold them for the State or sell them as forfeited forever, unless redeemed by the delinquents.

What is the right of a government, with regard to property liable for taxes?

The right is not *jus in re*. It is only *jus ad rem*. It is a right *in* the property to the amount of an ascertained sum of money. It is not a right *to* the property; not title to, and ownership of, the property. It is a charge upon the property without reference to the matter of ownership.¹ Every State in the Union holds that tax is a lien upon the property taxed; that it is a *jus ad rem* and nothing more.²

¹ Dunlap v. Gallatin Co., 15 Ill. 7;
Dennis v. Maynard, Ib. 477.

² As all the courts, State and Federal, are uniform in this, it would be

What is the *status* of property delinquent for not having paid the assessment upon it?

It is not a thing guilty. It is not a thing hostile. It is a thing indebted. By legal fiction, it owes the tax, but it is not an offending thing: no offense has been committed *in, with or by* it. It has not been made the instrument of the contravention of a law having forfeiture for the sanction, but it is, precisely like all other property upon the assessment roll, subjected to a certain sum as a contribution for the support of the government, and it simply becomes *indebted* by reason of the imposition of the tax; and delinquently indebted, when it does not pay its debt within the required time.

What must be the character of an action *in rem* to vindicate a tax lien, if courts were resorted to for the purpose?

It must be a civil proceeding, to enforce a *jus ad rem* against an indebted thing, to have it condemned to pay the debt and satisfy the lien: not to have it condemned *in toto* as in the case where a *jus in re* is vindicated against a guilty or hostile thing to have it condemned absolutely and in entirety as forfeited or confiscated.

What greater effect can government produce by the avoidance of the courts?

None greater, if, indeed it thus constitutionally produces any legal effect at all upon the *status* of the property.

1. An indebted thing cannot be condemned beyond its indebtedness.

2. Failure to pay does not convert a thing indebted to a thing guilty.

3. Forfeiture, under the tax laws, is necessarily predicated upon the false assumption that failure to pay is an offense.

4. The tax statutes have not created such an offense, if, indeed, such an offense could be created by statute.

5. Courts therefore cannot condemn a *res* for non-payment of taxes; and, for the same reason that the court cannot, *in personam*, decree forfeiture as a penalty.

6. Nor can there be forfeiture without judicial action.

a work of supererogation to cite all authorities holding that the tax cred-

tors' right is *ad rem*. There is not one decision which holds it to be *in re*.

§ 233. **Property can only be Condemned to Pay what it Owes.** In support of the first proposition, it may be confidently said that there is no imputed, primary responsibility of the thing beyond the debt. The removal of that incumbrance, leaves it free from any liability, whether the removal be voluntary or forced. Beyond that, the libellant cannot go without intrenching upon the right *in re* of the owner.

The debt may be large, approaching the saleable value of the property; it may be small, not exceeding one *per centum* of such value. The principle is the same, in either case. We will illustrate by the latter, since the wrong of forfeiting property for a debt is more apparent in such case.

Property assessed at a thousand dollars could, in such case, be forfeited for the non-payment of a debt of ten. Nine hundred and ninety dollars are taken from its owner without right; without cause of action. How clearly would the wrong appear, were a private citizen thus to take land without giving a *quid pro quo*? If government does so there is this difference: what would be fraud in the citizen is tyranny in the government.

It is well settled that a thing, for debt, cannot be condemned beyond its indebtedness, when the libellant is a private person, as will be fully seen in our fourth book, in which indebted things are treated. It will also be seen, that in all cases discussed or cited in which the government proceeds upon a lien, condemnation is limited to the satisfaction of the lien. The postulate, however, goes further than this, and asserts that it cannot be that condemnation go beyond. Happily, we are saved from argument to sustain such broad ground, since the constitution establishes the proposition. The fourth and fifth amendments inhibit unreasonable seizures, inhibit warrants without cause of action against the particularly described thing to be seized, and forbid the deprivation of any person of property without due process of law, and the taking of private property for public use without just compensation. These inhibitions are undoubtedly applicable, if the property be considered as an indebted thing, with the *jus in re* vested in a person behind it; for, if so considered, the seizure of it for condemnation as a whole as forfeited, when the lien covers but a part, is unreasonable as to

the major portion; the warrant for the purpose of forfeiture would be without cause of action even of a probable character, and the forfeiture itself would be deprivation of the owner of his property without due process, as well as it would be the taking of his property without any compensation whatever beyond having his one *per centum* tax debt satisfied. And, where the courts are avoided, the articles distributing the powers of the government among the three departments would be disregarded by the executive forfeiture for taxes.

§ 234. **Failure to Pay Does Not Convert a Thing Indebted to a Thing Guilty.** Does failure to pay taxes operate upon the property taxed so as to change its *status* to that of a forfeited, guilty thing? An offending thing is already forfeited: the decree of the court against it is a mere pronouncement of the *status*. Does non-payment *ipso facto* make a debtor-thing an offending one, already forfeit? If it is not at the particular moment when property becomes delinquent, (by the imputation of its owner's delinquency,) that it changes its status, ceasing to be merely indebted and becoming guilty, ceasing to be the property of any private owner and becoming vested in the government by forfeiture, when is the moment of transition? It must be *eo instanti* or not at all.

At such an instant, it must be that the owner's title is divested, if the new title from forfeiture is then vested in the State. That owner's rights are as sacred, when his property is proceeded against *in rem* as when there is a suit against him in person with the view of taking his title. He knows that there is a tax lien against his property, but he knows, too, that it is limited to one *per centum* of the property's value. Now, if his failure to pay is an act of forfeiting, on his part, the indebted thing must thus have been converted into a guilty thing, which would be impossible in the absence of statute provision to that effect, if such provision could, indeed, be made.

Retroaction, under the law of relation, must have some distinct time to reach back to, when the forfeiting occurred; when the divesting of one owner and the investing of another, took place. It may be said that such time was not necessarily fixed to be when the tax became due and was not paid, since statutes

usually give grace. That is true, but it does not alter the case; for, when the days of grace expire, then the forfeiting occurs, if at all. It may be said that the statutes usually require some act of the tax collector, or transfer in some title office, or conveyance office. True, there may be preliminaries. As, under some revenue laws, the government must elect between libelling for forfeiture or some other remedy, as has been shown, so, under the tax laws, there may be discretion allowed the lienholder: yet must there be a distinct time when a taxed thing changes from an indebted to an offending and forfeited thing—a moment not fixed by the seizure unless the statute should so expressly declare, and certainly not by the judicial condemnation, since a *jus in re* to justify the proceedings must previously have existed, and could not possibly exist so long as the libellant held only a right *ad rem*.

In Ohio, the moment of transition seems to be that when the property, offered for sale as an indebted thing, fails to get a bidder.¹

How can an offense be committed by use of the property, so as to render it forfeited to the State, because of the failure of the public to bid?

If it be thought hypercritical to insist upon this necessary change of *status*, one might answer the objector by saying that it is better to err on the side of precision, than on that other side where great looseness is the fashion. Those who are impatient of legal restraints when tax questions are discussed, especially when collection from delinquents is the question, seem to think that government, in its necessity of being supported, may resort to the most illegal inventions of means. Some of their extraordinary positions will be noticed later in this chapter.

The tax collector should be held to the law—nothing more. Neither he, nor the State behind him, can effect the forfeiture of a thing in debt for taxes, nor legally declare the forfeiture to have been made by the owner, unless there has been a trans-

¹ *Stambaugh v. Carlin*, 35 Ohio St. 209; *Magruder v. Esmay*, Id. 221; *Rhodes v. Gunn*, Id. 387.

ition from *indebted* to *guilty*, on the part of that thing; and unless there has been a time when such transition was effectuated. And as there can be found no such epoch, there is no transition. The property remains a thing indebted, liable to have the debt collected of it even if it should take the whole to pay; but it is not an offending thing to be condemned as forfeited irrespective of the amount of the debt.

§ 235. **Delinquency Not an Offense.** Is delinquency an offense?

Not *per se*. There may be moral turpitude in failure to pay what one owes, but there is no legal turpitude.

May delinquency be made an offense, *malum prohibitum*?

Not unless there is some element of fraud in such delinquency. Non-payments, under the laws of the United States prescribing and regulating the collection of duties, etc., are, under certain circumstances, made offenses by statute, so as to render goods forfeit upon which such unpaid duties are due; but it is where duties are evaded or withheld in fraud of the government. Goods are easily spirited away, and the fraud conveniently consummated, unless there can be speedy seizure of them as offending things.

If failure to pay a tax could, in any case, be treated as a fraud upon the State, it would be where personal property is delinquent, since it is susceptible of removal; but when we come to real property, no such reason for the presumption of fraud exists; yet it is that class of property which is sought to be treated as an offending thing for delinquency.

Delinquency cannot be made an offense, *malum prohibitum*, so far as land is concerned. It is immovable property, as the civil law styles it. It can easily be proceeded against as an indebted thing, and, therefore, there is no reason, to be drawn from the necessity of the case, for making it by statute, a guilty thing.

Besides, the element of fraud is wanting. It is impossible that the owner can so dispose of the land as to get rid of the tax. The lien follows it everywhere. The proper enforcement of constitutional laws cannot fail to secure the satisfaction of the lien. The legislator cannot create an offense in such case,

where there is no legal turpitude, no necessity in the nature of the case, and no element of fraud, and no possibility of evasion.

It is no answer to say that many taxes remain upon assessment rolls uncollected; for the fault in such case is always either in the statute or in the bad execution of it. The power of the government is sufficient to collect its dues for taxes which always should be a mere *minimum* of the value of the land taxed.

Since forfeiture for the non-payment of taxes is predicated upon *the offense of delinquency*; and since the predicate is a false assumption it follows that there can be no forfeiture of property for failure to pay taxes, especially, in the absence of any statute creating such an offense.

§ 236. **No Statute Creating Such an Offense.** No such offense is created by any statute; at least, not in terms. No such offense, subjecting the owner of property to accusation of crime or misdemeanor, has been enacted, certainly; but that would not be necessary. A thing may be rendered guilty by an act of its owner done by its instrumentality, though the owner be not rendered an indictable offender. The revenue laws are full of illustrations of this, as we have seen. But no statute has been enacted rendering property an offending thing by reason of its owner's failure to pay his taxes upon it—which is more to our purpose.

True, there are statutes providing that in case of non-payment, under certain circumstances, land shall be forfeited; and doubtless there are creations of offenses by the revenue and navigation laws in terms not more comprehensive. But there is this marked difference: the revenue and navigation laws, as a system, deal in forfeitures and always couple the element of fraud or design to defraud, expressly or impliedly, with the non-payment, and submit the adjudication of offending things to the courts; while, on the other hand, tax laws do not, as a system, embrace forfeiture as a subject, never connect non-payment with fraud, and, though they not unfrequently require judicial action against taxpayers personally, the statutes which provide for forfeiture always steer clear of the courts. It is as evident, on the one hand, that when the former laws provide, in

the general terms we have mentioned, for forfeiture in case of non-payment, that they mean to make the property, for which the payment should have been made, an *offending thing*, as it is, on the other, that when the latter laws provide for forfeiture in like terms, they do not mean to create an offense chargeable against property as an offending thing. The intent of the legislator in the former case is manifestly very different from his intent in the latter. His idea, with regard to forfeiture of the property of delinquent tax debtors, is based upon the vague theory that government has some right to property under the doctrine of eminent domain. He proceeds as though all property-rights in real estate were traceable primarily to the government. He confounds the police power of our government with the power of eminent domain. If such, or like considerations do not control him, when providing for the forfeiture of non-offending lands, why not trust the courts?

A fair interpretation of the statutes providing for such forfeiture, by the received rules of construction; and a fair inquiry into the intention of the legislator, where there is ambiguity requiring such inquiry, lead to the conclusion that those statutes have not created the *offense* of delinquency.

§ 237. **There Can Be No Forfeiture.** Courts, therefore, cannot condemn lands as forfeited for the non-payment of taxes, even did the statutes refer indebted property to the courts for such purpose, since, in the absence of the creation of an offense, there is no right to the property vested in the government by reason of the delinquency of the debtor-owner. No one would contend, for a moment, that an action *in personam* would lie against the delinquent to have his land forfeited in penalty for not paying a tax amounting to a hundredth part of the land's value, in the absence of express statute authorization; and the *jus in re* of the owner is just as sacred when attacked by another form of action. It need not be discussed whether courts could recognize as constitutional, any statute that should presume to go so far. With no statute at all creating forfeiture for an offense, the courts can no more pronounce condemnation *in rem* than they could, with like lack of authorization, adjudge forfeiture against a debtor in a suit *in personam*.

Were the forfeiture for an offense committed through the instrumentality of the land, there would be no limit to the amount of real estate thus forfeitable as an offending thing; since, if a large tract should all be thus used in offending, all would be forfeitable; but it has been held that a large tract cannot be forfeited when less would be sufficient to satisfy the tax.¹ This clearly shows that the proceeding is really upon a lien for a tax debt, and not upon a *jus in re* for forfeiture for an offense. The tax is a lien at law.²

§ 238. **Absence of Judicial Action.** Can there be any such forfeiture then? Can there be any, without judicial action? Evidently the authors of certain statutes have meant that there should be. Their intention is easily gathered; but, whatever it may be, their enactments are plain upon the face, and need no inquiry into the intent. They seek virtually to forfeit by bill. They seek at least to reach the results of judicial action without resort to judicial action. The statutes do not name persons and pronounce their lands forfeited, but might as well do so.

Take any case, in which land has been forfeited for taxes. Between the date of the State's acquisition of its right to the tax-money, and the date of the forfeiture of the land for non-payment; between the date when the citizen owned the land and that upon which the State finds itself the owner, something must have intervened. That something must have been judicial action. There could have been no avoidance of it. Who exercised such action? It ought to have been a court, but it was not. It was the tax collector, who returned the land as forfeited; or the State auditor, who received the return and acted upon it; or the recorder of deeds or conveyances, who erased one title and substituted another; or it must have been somebody else, who was not a judge: such person or persons as the statute of any particular State required to do the work.

Whence did such a person acquire jurisdiction—the power

¹ French v. Edwards, 5 Sawyer, 266; Whitman v. Learned, 70 Me. 276.

² People v. Biggins, 96 Ill. 481; Union Trust Co. v. Weber, 96 Ill. 346. See the case of People v. Smith, 94 Ill. 226.

to hear and determine? It is hardly advisable to pursue this line of thought any further. The necessary judicial action could not have been constitutionally performed by non-judicial persons.

This subject has been here discussed under the application of the principles which govern proceedings *in rem*; for, though the statutes authorizing forfeiture of land for taxes do not provide for judicial proceedings directly against the property itself, they do provide for executive action directly against the property itself: and the argument proving that there can be no judicial proceedings *in rem* to declare property forfeited, in the absence of *jus in re*, is applicable to executive proceedings *in rem* where that right is wanting, even if judicial functions were not inhibited the executive department of government. In a word, if courts cannot be constitutionally empowered to pronounce the forfeiture of land, by action against itself, for its non-payment of taxes, tax-collectors cannot be so empowered, for the same reason; and also, for the further reason, that they are not judges.

It is a mere corollary that with regard to the action *in personam*, the same constitutional inhibitions exist. By neither form of action can government take land without the right to take it; and certainly the avoidance of any judicial action at all does not better the State's position.

§ 239. **Conflict of Decisions.** It will be objected that the tax collector's seizure is to coerce the payment of taxes; that the sale is subject to redemption; that the forfeiture is not necessarily final; and that rigorous measures are justified by the necessity of the support of government.

These, and other objections will be noticed in connection with judicial expositions of tax laws authorizing forfeiture. It is not proposed to mention and discuss the many decisions, in the different States, upon this subject, but to draw fair samples embracing all the arguments used in support of such statutes. Many of the decisions are confined to the exposition of acts without reference to the right of the legislature to enact them; and it will not be necessary to follow the niceties of construction in such cases, where the constitutionality is assumed.

Both sides of the question have been stoutly championed; and the result has been that some of the States maintain the forfeiture while others do not: Maine and Virginia being illustrative of the former;¹ and Kentucky, Minnesota and Mississippi, of the latter.² Virginia, however, was formerly against the constitutionality of such forfeiture.³

The case of *Griffin v. Mixon*, with the dissenting opinion of Mr. Justice HANDY therein, presents both sides of the question as fully, perhaps, as do the other cited cases *pro* and *con.*; so some space will here be devoted to that. The court hold forfeiture of land for taxes unconstitutional, but with no arguments additional to what we have herein substantially advanced, and without express mention of the want of the *jus in re*: it is, therefore, to the dissenting opinion that we turn to find stated the objections to the position herein-above taken.

Not quoting Judge HANDY's language, let us merely take up the general objections ably stated by him and frequently urged by others; not confining ourselves to his argument, but trying to answer the usual arguments in favor of the forfeiture, and thus meet his.

§ 240. **Distrain.** The law of distrain is urged, with the addition that if a State may distrain without previous judgment, and sell the assessed property to make the tax, there is little difference between thus selling it and forfeiting it subject to redemption, since little is ever bidden beyond the amount of the tax claim. The answer is, Whatever the practical result of vindicating a *jus ad rem* by sale, the difference in principle between that and forfeiture is as wide as possible. The difference would be so apparent as to immediately shock the judicial

¹ *Hodgden v. Wight*, 36 Me. 326; *Adams v. Larrabee*, 46 Me. 516, 519; *Statts v. Board*, 10 Grattan, 400; *Allen, J.*; *Wild's Lessee v. Serpell*, Id. 405; *Lee, J.*; *Hale v. Branscum*, Id. 418; *Allen, J.*; *Flannagan v. Grimmet*, Id. 421; *Allen, J.*; *Usher's Heirs v. Pride*, 15 Id. 190; *Allen, J.*; *Bennet v. Hunter*, 18 Id. 100.

² *Barbour v. Nelson*, 1 Litt. 60; *Robinson v. Huff*, 3 Id. 38; *Currie v. Fowler*, 5 J. J. Marsh. 145; *Harlan's Heirs v. Seaton's Heirs*, 18 B. Monroe, 312; *The Anthony Falls Co. v. Greely*, 11 Minn. 321; *Baker v. Kelly*, Id. 480; *Hill v. Lund*, 13 Id. 451; *Griffin v. Mixon*, 38 Miss. 424.

³ *Kinney v. Beverley*, 2 H. and M. 318.

sense, were a private creditor to take the whole of a thing to satisfy a claim amounting to a small percentage of its value.

Distrain by the State, for the purpose of collecting a given sum due for the support of government, bears no analogy perceptible to forfeiture of the whole for non-payment of that sum. Distrain, even for the collection of the given sum, is of questionable constitutionality, when we consider that the State's lien for taxes is a lien without possession. The courts exemplify the State's distraining for taxes by the landlords for rent. But the landlord's lien is accompanied with a sort of possession of the property upon which the lien lies. At least, such property is in a house or on premises owned by him, and he may prevent their removal while his lien remains unsatisfied. So of many lien holders under the common law, tailors, who may retain the coats they have made till payment, etc. But the State has no sort of possession of land on which its tax lien lies. Its lien is sufficient to justify judicial seizure, but is it not at least questionable whether the ancient law of distrain will cover the case of a State's executive seizure, even in vindication of its *jus ad rem*?

Distrain by the landlord does not cut off the tenant from his legal rights; it merely shifts the *onus* of prosecution and proof. Replevin is a remedy available by the latter. Action for damage is his right, if injured. But the State cannot be sued. Though the tax-payer may have a receipt, and may desire to recover the money which has been collected by coercion and distrain after lawful payment had been once made, he cannot sue the State. It is no answer to say that he may obtain damages of the oppressive tax collector. What may work no harm in case of distrain by the landlord, may prove something of no milder name than oppression in case of distrain by the State. However, if the State may lawfully and constitutionally distrain for the amount of the assessment, such right is no argument in favor of forfeiture.

241 §. **Coercion.** Again: it is said that the forfeiture is not final, since it leaves the land subject to redemption, and that, therefore, it is justifiable as a means of coercing the landowner to bear his part of the public burden in supporting the

government. But coercion is oppression in cases where the person coerced has a good defense which he is precluded from asserting. He may be prepared successfully to plead payment; his lands may be exempt, because devoted to education, charitable or religious uses, as provided in some of the State constitutions; he may have other good defenses. The argument for coercion is based upon the unwarrantable assumption that delinquency has been judicially ascertained, and that nothing remains to be done but execution. It is a begging of the question. Certainly, where the land owner has the legal defense of payment, exemption, etc., coercion without giving him opportunity to defend, is oppression. If, in such case, it is so, then, in all cases; for, by what right may the tax collector, or any other executive or ministerial or even judicial officer, be authorized to say arbitrarily who shall be allowed to plead and who shall not? And, if coercion of any sort were allowable, the forfeiture of land would not be justifiable on the plea that it is subject to redemption, and that therefore the forfeiture is only a means of coercion; for, as we have seen, the means are unconstitutional if it is really a forfeiture without *jus in re*. Is it really such? Susceptibility of redemption does not alter the case. The wronged owner may not be able to pay the sum necessary to the redemption. He may think the requirement unconstitutional and oppressive; and, he may not willingly submit to the requirement. It is no answer to say that he would be foolish thus to let his interests suffer; for the question is one of right; and, though he might better allow himself to be wrongfully coerced to pay the tax, than to suffer more loss through sentiment, is the State right in thus driving him to the wall?

Susceptibility of redemption does not make the forfeiture any the less a forfeiture; and does not make it legal, if otherwise illegal, whether the land-owner redeems or not. For, in the absence of *jus in re*, the land cannot be contingently forfeited, subject to redemption. All the argument based upon the want of the State's *right* to the land, applies with full force whether the privilege of redemption be considered or not. The privilege can make no possible difference in the argument.

Government cannot condemn as forfeited a guilty thing, or a hostile thing without previously having *jus in re*, even if the privilege of redemption were accorded the offender or the enemy, as the case might be. Certainly, it cannot have greater power over an indebted thing, to collect taxes of it where there cannot be any *jus in re* whatever possessed by the State—the creditor.

§ 242. **Eminent Domain.** The argument so frequently and so vaguely drawn from the government's right of eminent domain, does not support the forfeiting of land to collect a sum due by it; for, whatever that right may be in a government constituted like ours, it is certain that the constitution inhibits the taking of private property for public use, (and, impliedly, for any use,) without adequate compensation previously made; and, beyond the amount of the tax, the forfeiture of land would be such a taking.

The government has no latent title or ultimate right to land in this country. The owner's right to it is as absolute as his right to personal property.¹ There is no knight-service due especially from free-holders as where feudal tenures prevail; the duty of allegiance has here no more reference to land than to any other property.² Allegiance is the correlative of protection, whether the citizen owns any property or not. There is governmental jurisdiction over property as well as persons; there is authority over it to control or destroy it, under the police power, for the purpose of promoting and preserving the public health and public order.³ But such authority does not reduce the ownership of land to a mere "tenancy" of any kind.

§ 243. **Necessity.** The necessity of supporting government, is made the *dernier* resort. In nine cases out of ten, where

¹ *Van Rensselaer v. Smith*, 27 Barb. 157; *Van Rensselaer v. Dennison*, 35 N. Y. 400; *Cook v. Hammond*, 4 Mason, 478; *New Orleans v. United States*, 10 Pet. 717; *Desilver's Estate*, 5 Rawle, 111-113; *Matthews v. Ward*, 10 Gill. & J. 443; *Wallace v. Harmstad*, 44 Penn. St. 500; *Arrowsmith v. Burlington*, 4 M'Lean, 497.

² *Cornell v. Lamb*, 2 Cow. 652; *Van Rensselaer v. Hayes*, 19 N. Y. 91-2; *Coombs v. Jackson*, 2 Wend. 155. For pro and con.: 1 *Washburn's Real Property*, 63-67.

³ *Commonwealth v. Alger*, 7 Cush. 92-102; *Taylor v. Porter*, 4 Hill, 143; *Commonwealth v. Tewksbury*, 11 Met. 57; *People v. Salem*, 20 Mich. 479-482.

courts in passing upon tax titles, support the forfeiture, this argument lies at the bottom of the decisions. One is reminded of the answer which Dr. Johnson gave to a man whom he had upbraided for pursuing an unlawful means of livelihood, and who had attempted to justify himself by saying that he must live: "I deny the necessity sir."

It might plausibly be questioned whether a government which, having lawful means of vindicating a *jus ad rem*, resorts to the unlawful assumption of a *jus in re*, takes private property without right, denies legal defense, and attempts to justify itself on the plea of necessity, is not liable to a like retort.

The necessity of supporting government is admitted; but the necessity of forfeiting property because of a per centage due by it, must be denied.

Tax is a contribution to support government; and it differs from an ordinary debt in that it is not subject to off-set, since it is of higher privilege than any ordinary debt, or any other privileged debt. But the amount of the contribution assessed upon one's property, does not differ from any other property debt so far as concerns the forced contributor's right of defense against the forfeiture of the *res* on which rests the debt secured by lien. Nor is the government's right to collect from the property different from its right to collect any debt secured by lien, so far as concerns the distinction between *jus ad rem* and *jus in re*. It follows, clearly enough, that the right of forfeiting, either absolutely or contingently, cannot arise upon the non-payment of an assessed contribution. The necessity cannot be maintained, if the contribution can be lawfully and effectually collected without the forfeiting of the property. The right and power are in the State to make its percentage of the value of the property without taking the whole. The courts are open to government for the collection of its dues, as they are to a private creditor. The judges and officers, appointed by the government or elected by the people, are not presumed prejudiced against the source of authority. States can get justice in their own courts. Nor is it to be presumed that the required contribution is so great that it cannot be easily realized out of the property upon which it is assessed. It cannot truth-

fully be said, therefore that, *ex necessitate rei*, the State must forfeit lands to get its tax.

How much litigation, uncertainty of tax titles, diversity of decisions, disturbance of public tranquility, and confusion generally, would be avoided, were it always borne in mind that the State's right upon property for tax-contribution is a mere *jus ad rem* upon which forfeiture, either absolute or contingent, cannot be predicated!

§ 244. **Power "To Lay and Collect Taxes."** It has been seriously argued that because Congress has power "to lay and collect taxes,"¹ and "to make all laws which are necessary and proper for carrying into execution" this power,² it has authority to forfeit property for the non-payment of tax dues thereon. This argument pervades not only the dissenting opinion of Mr. Justice HANDY in *Griffin v. Nixon*, above cited, but it is found frequently in reported briefs of counsel, if not in opinions of courts.

If the power of our legislators "to collect taxes" has been rightfully construed to enable them to avoid the courts when making such collection, still that power does not enable them to forfeit the property on which taxes rest, without resort to the courts; nor, even with such resort, to take it in vindication of a mere *jus ad rem*, unless, indeed, in their unlimited rein as to rates, (consulting the opinion of C. J. MARSHALL,³ followed by others, that "the power to tax involves the power to destroy,") they should levy a tax upon property at the rate of one hundred *per centum*. Annual assessment to the amount of the annual income, would practically amount to the taking of property for taxes. Doubtless there are limitations to the taxing power of Congress, found in many implications of the Constitution, and especially, in its spirit, which so forbids the neglect of the public welfare as to inhibit taxing to the point of destruction. The exact limit cannot be defined; but it certainly lies within the average income of property. In time of war, the rule may be relaxed; but, in ordinary times, to tax property annually

¹ Constitution, Art. 1, § 8, Clause 1.

² *McCulloch v. Md.*, 4 Wh. 316.

³ *Id.*, Clause 18.

beyond the average annual income from such property; to tax money, for instance, beyond the legal rate of interest, would be practically to destroy rather than to tax. And, (though against high counter opinion,) it must be held unconstitutional for Congress to "lay and collect taxes" to the point of destruction. In speaking of the average annual income of property, it would be wrong to say that property which yields no income at all is not to be taxed at all. Vacant lands are not to be exempt. Taxes should be levied upon property *ad valorem*: not according to the usufruct. But, by qualifying income with the words "average annual," the meaning sought to be conveyed is, that when property taken altogether—all the property of the country, is annually taxed beyond the rental or other profit that it is capable of yielding the owners, it is taxed to the point of destruction; and that this is not only without constitutional warrant but is violative of the spirit of the Constitution; is against the "public welfare" instead of being promotive of it; is in contravention of several implications of the Constitution, and is subversive of the very article invoked to sustain it, since the destruction of property would cut off the power to "lay and collect taxes" upon it subsequently.

§ 245. **Similar Grants Limited.** If there is no limit to the amount of tax that may be laid; if property may be taxed annually at the rate of one hundred *per centum*; if Congress has the right and power to destroy values by taxation; if it has the right and power to forfeit a *res* to vindicate a *jus ad rem*, (which is the same as destroying it *quoad* the owner,) then, under the same article and section of the Constitution, there is no limit to the other grants of power, except where there is express qualification. Money may be borrowed on the credit of the United States, to the point of the destruction of that credit; money may be coined, and its value regulated, without limit as to the character of the metal or its intrinsic value, etc., all of which seems very absurd.

If the judiciary had jurisdiction over the question, whether paper could be made money and become legal tender, would it not have like jurisdiction, should Congress attempt to coin pewter and to give it the value and the paying power of gold? If

so, how is the coining power limited, yet the taxing power unlimited, when the grant is in precisely the same terms? Why may the judiciary declare unconstitutional the congressional converting of paper or pewter into money, yet not have jurisdiction to pass upon the tax power?

The great jurist, whose name and *dictum* have been so often cited to sustain the unlimited power of Congress to tax so far as to destroy, did never decide that property could be forfeited to collect a *minimum* of its value. He did never decide that to collect a tax lien upon property anything more than the tax, costs, etc., could be collected from the property. Even if he held that the rate of taxation might be without limit, he did not hold that the non-payment of an ordinary tax, (say one per centum,) might constitutionally be made ground for forfeiting the indebted thing as though it were a guilty or hostile thing. But if the last word of the clause, "Congress shall have power to lay and *collect*," is still thought to justify the forfeiture of taxed property as a means of coercing the collection of the tax due upon the property, the last clause of section eight may be invoked, where the *collecting* power is expressly limited to what is "necessary and proper." "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." If, therefore, it is not necessary to forfeit land to collect a small percentage due by it, when it may be seized and sold as an indebted thing and the percentage easily taken from the price, Congress has no power to make a law authorizing such forfeiture. If it is not "necessary" it certainly is neither "proper" nor honest; nor is it an "appropriate" means. So there is absence of grant thus to legislate. And, beyond the sum due for the tax, costs, etc., the forfeiture of the property is inhibited by the amendment which forbids the taking of private property for public use, (and, impliedly, for any use,) without adequate compensation, as shown above.

If it be said that Congress is the judge of the necessity and propriety—not the courts—it may be inquired whether Congress may judge it necessary to legislate pewter into gold, or to coin it and fix its value as equivalent to gold, without lia-

bility to have the necessity inquired into by the courts? Should Congress conclude that torture is "necessary and proper" to coerce the delinquent tax debtor, must the judiciary be dumb?

As to the decision of Judge MARSHALL in *McCulloch v. Maryland*, above cited, it was not upon the subject of forfeiture to satisfy a lien, but upon the confiscation of property where the government had an undoubted *jus in re*: so, as a decision, the authority is not in point. The expression, that the "power to tax involves the power to destroy," not being necessary to the decree, is *obiter dictum*.

Has it been decided—has it been settled by the courts—that property may be forfeited for the *non*-payment of a tax?

It has been seen that State supreme courts are so divided that they cannot be said to have settled the question so as to enable us to say what is the law; but, in the many States, so few of those courts have held that a *res* may be forfeited in enforcing a lien; and those few have so constantly avoided the distinction between indebted things and things guilty or hostile, that the weight of State judicial authority seems greatly to preponderate in favor of the negative of the proposition.

§ 246. **Can mere Sale Work Forfeiture?** This question was discussed before the United States Supreme Court in a case which had come up from Virginia.¹ It was in exposition of the "Act for the collection of direct taxes,"² section four of which provided that the title of land upon which the tax shall not have been paid, "shall thereupon become forfeited to the United States, and, upon the sale hereinafter provided for, shall vest in the United States or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title and claim whatsoever." The sale is to be by the tax commissioners, without resort to the courts for condemnation of the land, or for an order of sale. The forfeiture is to be without any offense creating a *jus in re* in the government; for delinquency is not made such by the act, if, indeed, it could constitutionally have been so made.

Under cover of this act, the United States tax commissioners

¹ *Bennett v. Hunter*, 9 Wall. 326.

² 12 Stat. at L. 422

had sold land of one Hunter, because a tax upon it was unpaid. The amount realized was eight thousand dollars: the tax was less than one hundred dollars. It was seriously contended that the property had been forfeited by the non-payment of the tax, so that the whole proceeds of the sale would thus belong to the United States. It had been held, in the court below, that as the tax, penalty and costs, had been tendered before the sale, the sale was void; and this the Supreme Court affirmed. But there were opinions expressed by the latter, through the chief justice, on the subject of forfeiture under the act, which should not pass unnoticed.

After showing conclusively that the first clause of the section quoted, could not, *proprio vigore*, work a transfer of the land to the United States; that "the general principles of the law of forfeiture seem to be inconsistent with such a transfer;" that "an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction;"¹ and that there could be no forfeiture without judicial inquiry or office found,² the court then made the following remarkable exposition of that clause, coupled with the second:

"It does not direct the possession and appropriation of the land. It was designed rather, we think, to declare the ground of the forfeiture of title, namely, non-payment of taxes; while the second clause was intended to work the actual investment of the title, through a public act of the government, in the United States, or in the purchaser at the tax sale. The sale was the public act, which is the equivalent of office found. What preceded the sale was merely preliminary, and, independently of the sale, worked no divestiture of the title. The title, indeed, was forfeited by non-payment of the tax; in other words, it became subject to be vested in the United States, and, upon public sale, became actually vested in the United States or in any other purchaser; but not before such public sale. It follows that in the case before us, the title remained [in Hunter

¹ Citing *Fairfax's Devisee v. Hunter's Lessee*, 7 Cr. 625.

² Citing 3 Black. Com. 258, and *United States v. Repentigny*, 5 Wall. 265.

and his son] * * * at least until sale, though forfeited, in the sense just stated, to the United States."

Either Hunter forfeited his land by not paying the tax when due, or he did not. If he did, he forfeited it to the United States at the time when he should have paid. If so, any subsequent judicial declaration of the forfeiture, or "office found" of any sort, retroacted to that time, as the date of the transfer of the property and title.

On the other hand, if he did not forfeit his land at that time, he did not forfeit it at all; for, if sale was forfeiture, (an impossible supposition,) it was the commissioner or auctioneer who forfeited it—which is absurd. But the court say that the land was not forfeited by Hunter at the time he became delinquent. His non-performance of duty worked "no divestiture of title." The title "became actually vested in the United States or in any purchaser; but not before such public sale."

True, there is contradictory ruling intertwined with the opinion just stated; but, when the court say, "The title, indeed, was forfeited by the non-payment of the tax; in other words, it became subject to be vested in the United States," etc., and also that "what preceded the sale worked no divestiture of the title," it is manifest that both rulings cannot stand together.

The reader must therefore take that which is consonant with the context, with the decree in the case, and with the settled law that forfeiture is not consequent upon the non-payment of a debt. But the court evidently did not mean to pronounce the act of Congress, or section four of that act, to be unconstitutional. On the contrary, they countenanced the section, but looked to the sale as the time of the forfeiting, and even declared it to be "the equivalent of office found."

If, by sale, title vests "in the United States or any other purchaser," who is the seller? The Tax Commissioners are officers and agents of the United States; and, in selling, either personally or through an auctioneer, they must either sell the defaulter's land, for the United States, *as creditor*, to make the money due on the land; or they must sell land already forfeited, not for the United States as creditor, but *as owner*; not to make the money due on the land for the tax, but to realize the full

price of the land. In Hunter's case, for instance, the commissioners sold, not to get the one hundred dollars tax, but to get the \$8,000, as price. Who was the seller? The purchaser might be the United States, who, (the court said,) would then become vested with title. That the United States could be at the same time both seller of what they owned, and buyer of what they owned, is absurd.

How could the government sell to some other purchaser, a title which it had not? Clearly, the government could not as owner convey the *jus in re* by sale, if not entitled to it before; and, it is also clear that the purchaser could not acquire it by sale, when it could not be sold.

As to sale being "equivalent to office found," it need not be discussed. The expression is vague. It must mean that sale is equivalent to a judicial finding of the fact of forfeiture; and such a postulate is wholly untenable and not debatable. Let what has been said against the exercise of judicial functions by executive and ministerial officers, suffice, with increased emphasis, when such officers are mere auctioneers.

§ 247. **Sale Transfers Property, When Condemned to Pay.** Sale by the United States, in the capacity of creditor, may doubtless transfer title to the purchaser, just as any judgment-creditor may cause the judicial sale of the property of a debtor, under execution, with like effect. Granting that distraint for taxes may be made, and the commissioner sell thereupon, the position of the government is that of creditor, selling to satisfy a *jus ad rem*. Under such circumstances, there would be no inconsistency in the government becoming the purchaser at such sale. In other words, the government, as owner, cannot buy and sell the same thing at the same instant; but it may, as judgment-creditor, (or tax creditor) sell what belongs to the delinquent to satisfy the tax, become the purchaser, and get title; paying to the delinquent the price, after deducting the tax.

This was Springer's case,¹ though the price brought at the sale did not exceed the tax. The title of the United States, the purchaser, was not from forfeiture but from purchase. If, at

¹ Springer v. The United States, (12 Otto,) 102 U. S. 586.

the instance of the United States, the Tax Collector had the right to seize and sell the indebted land in vindication of a *jus ad rem*, without resort to the courts, (a subject not before us,) there remains no question of the right of the United States to buy. Springer lost his property, but not by forfeiture.

Neither the case of *Bennett v. Hunter* nor that of *Springer v. The United States*, is authority for the forfeiting of property for taxes either absolutely or contingently, since the remarks favoring it were not necessary to the decision in either instance; nor is there any case in which our highest tribunal has directly decided that there may be forfeiture to satisfy a tax lien against an indebted thing which is not made by statute an offending thing. They have, however, sustained tax forfeiture, without distinctly deciding this point, in terms.¹

§ 248. **The Act to Collect Direct Taxes.** But it is exceedingly to be deplored that, by any remarks in an opinion, they should have countenanced the section four, quoted from the "Act for the collection of direct taxes," etc., (above cited;) for that section does in terms authorize the forfeiture of land for its tax debt; the transfer of the title in fee simple from the owner, without regard to the relative amount of the *jus ad rem* and the *res*; and the annulling of "all prior liens, incumbrances, right, title and claim whatsoever." It is monstrous. By what right could Congress say that a valid mortgage should be "discharged" or annulled, if the property should be amply sufficient to satisfy the tax lien first, and the mortgage afterwards? By what right could Congress say that the United States, as a creditor, could take a hundred times its due, while lien-holders of inferior rank should get nothing?

Take this very case of *Bennett v. Hunter*. The reporter, in his statement of it, says that the "tax, expenses, penalties and costs" were altogether "within \$100," while the property sold at the tax sale, for \$8,000: Why should the government take \$7,900 too much, while the honest lien holders, (had there been any,) could, under the Act, get nothing of their honest and unforfeited claims? And, with the tax paid, (if all other liens

¹ Keely v. Sanders, 99 U. S. 441; Sherry v. McKinley, Id. 496.

were allowed to be satisfied out of the proceeds,) what justice would there be in withholding any surplus from the lawful owner? Or, if there were no other liens, (as may have been the fact in Hunter's case,) what justice was there in attempting to withhold the surplus from the owner?

The section is monstrous; and it is to be regretted that the court did not declare it unconstitutional; but there is the satisfaction of knowing that the decision turned upon the point whether tender of the tax before sale rendered the sale invalid, and that therefore the remarks favoring the section are not authority in favor of its constitutionality. This point has been since reaffirmed.¹

This chapter does not treat the subject of the distraint of an indebted thing for the collection of a tax; but the question discussed is whether forfeiture may be declared in case of non-payment. This work, being confined to judicial proceedings *in rem*, avoids the subject of distraint without resort to courts. It might also have avoided *executive* forfeiture; but the reasoning applies to that, showing that neither judicial nor executive forfeiture can be pronounced in the absence of any *jus in re*.

Although the United States no longer collect direct taxes, yet the Act discussed above was found convenient for the presentation of the general principle that property cannot be forfeited in vindication of a mere *jus ad rem*, either by resort to the courts or otherwise; and thus the examination of State statutes subject to the same criticism has been rendered unnecessary. Unhappily, the States which have resorted to the unwarrantable procedure have not repealed their statute authorizations to forfeit indebted property without any *jus in re*, and they may still go on thus breeding litigation and disturbing good titles; but it will be readily perceived that if the argument submitted herein against the Federal law is sound, it must include within its scope all similar State statutes.

¹ *Atwood v. Weems*, 99 U. S. 183.

CHAPTER XXVIII.

MAY PROPERTY BE CONDEMNED TO PUNISH OFFENDERS?

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§ 249. **The Affirmative has been Averred.** Before closing this branch of the general subject, it seems necessary to notice some conflicting decisions. It was deemed better to notice them in this way than to add them after the term *contra* to every decision or list of decisions that has been cited thus far in this book. They are indeed contrary to the settled doctrines that proceedings against things are always civil in character; that there must be a pre-existing right in or to property before it can be proceeded against; that such right to a guilty thing can spring only from an offense committed in, with, or by it; that the defendant in such action is always a thing and never a person; that a decree against property, after general notice, rendered by a court of competent jurisdiction, when final, is conclusive against all the world; that the object of such judgment against a guilty or offending thing is to pronounce upon its *status*, (whether forfeited or not,) and that absolute forfeiture vests in the libellant a title new and complete. All these doctrines, supported for so long a time and by so many decisions, are opposed by the conflicting ones, (to which brief attention is invited,) provided the latter belong at all to this division of the general subject. In other words, if the proceedings *in rem* treated in those adverse cases were really

against *Things Guilty*, they would properly belong to the first class of things in our general classification, and should properly be accounted for in this book, and reconciled with the many decisions already cited, if possible; or frankly acknowledged to be a new departure in the branch of legal science under discussion, if reconciliation is impossible.

These conflicting cases go even further; they strike at the foundation of all actions directly against property, since they teach that persons may be punished for personal offenses by proceedings against their property. It has therefore been thought advisable to probe them by the question made the caption of this chapter. If they be found to teach the affirmative, it will be seen, without argument, that they thus array themselves against the personal protection vouchsafed by the organic law. But relief will happily be found in the fact that other cases, belonging to their own class, accord with the many cases cited in this book in the support of the several doctrines above enunciated, and in the prime principle that a proceeding *in rem* cannot be against any person.

§ 250. **Ruled—That Land was Condemned to Punish for Treason.** May property be condemned to punish offenders? The land of French Forrest having been absolutely condemned and sold, his son Douglass attacked the decree by bringing a collateral action of ejectment against the person in possession by title from the purchaser; and the defendant, having been defeated in this personal suit, took it finally to the Federal Supreme Court. The absolute condemnation having been made the defense, the court discussed it in deciding the personal action,¹ and held that “the proceeding was wholly *inter alias partes*,” that “the land was not seized or condemned for any act” committed by Douglass, the son, but was seized, “condemned and sold” in punishment for the offense of treason, committed by the father, though not used or made the instrument for perpetrating such a personal crime. They said of him: “The punishment inflicted upon him is not to descend to his children;” and of the effect of such a forfeiture, that they

¹ *Bigelow v. Forrest*, 9 Wall. 339.

“did not care to speculate upon the anomalies presented by the forfeiture of lands of which the offender was seized in fee,” etc., thus showing that they held the proceedings *in rem* to have been for the personal punishment of French Forrest for a personal crime, without arrest, indictment, jury, trial, sentence or execution. Considered as a proceeding to punish an offender, the action against the land was clearly null and void. Considered as a proceeding to condemn the land as a guilty thing, it was null and void, since no offense had been committed by its use, or through its instrumentality, and there was therefore no *jus in re*. But the decision with regard to it, in the collateral case, did not hold it null and void but valid and constitutional provided the *res* be shorn down to an interest in it.

Another of the conflicting cases went up from the Federal courts in Virginia;¹ and though it was an action against land, and not against any person, it was remanded on the ground that the plaintiff in error, the alleged owner of the *res*, had been personally “assailed” by a proceeding *in rem* for his “offenses,” “guilt” and “criminality,” and yet not allowed to be heard in his defense: the District Court having ruled that he could not plead in court without first renouncing his enemy character.

§ 251. **Ruled—That an Action In Rem was Personal, Punitive and Criminal.** After condemnation absolute and final had been judicially pronounced upon two squares of ground, and the property sold, a collateral attack was made upon the decree in a court of the State of Louisiana, which ultimately found its way to the National Supreme Court, where they discussed the proceedings *in rem* which were embodied in the record. The case² was brought by a defaulted mortgagee against the purchaser of a part of the *res*. It was held that the action against the two squares had been personal, punitive and criminal in character, and that the *res* was the property of an offender, proceeded against to punish him for his offense, though such offense had not been committed in, with or by the two squares, nor through their instrumentality in any way. One would

¹ *McVeigh v. United States*, 11 Wall. 259.

² *Day v. Micou*, 18 Wall. 160.

suppose that the sequence would be the nullity of the action against the thing; and that only on the basis of such nullity would the court have jurisdiction to disturb the original decree; but, on the contrary, that decree was held valid, though shorn more closely than that of Forrest's land had been, since instead of reducing the *res* from the land to an interest in it, they allowed the defaulted lien holder to recover the entire *res* from the purchaser; or, what amounted to the same result, they allowed the property to be wholly exhausted to satisfy a mortgage that had been due and owing but not presented at the time of the condemnation by proceedings *in rem*.

§ 252. **Similar Rulings.** Again the doctrine, that a civil proceeding *in rem* is a criminal action *in personam*, crops out in Osborne's case;¹ for the court said that the pardon of the enemy Osborne covered "the offenses for which the forfeiture of his property was decreed." * * * "The pardon of the offense necessarily carried with it the release of the penalty attached to its commission;" "it is the very essence of a pardon that it releases the offender from the consequences of his offense." "If the proceedings to establish his culpability and enforce the penalty," etc. "The forfeiture results * * * from the offense which the decree establishes and declares."

No one could have used these expressions while discussing a civil proceeding *in rem*, nor have applied them as they were applied, without forgetting for the moment that there could have been no establishing of personal culpability or criminality to enforce a penalty or punish an offender, without a personal trial.

The case of Wallach² is a follower of the Forrest case, so far as it treats of "working a forfeiture" of the property of the "offender," since it is impossible to apply the quoted terms to civil proceedings. The idea of a criminal proceeding to punish an offender, underlies a part of the opinion in this collateral case, and is the basis of the decree, though the better portion

¹ Osborne v. United States, (1 Otto,) 91 U. S. 474.

² Wallach v. Van Riswick, (2 Otto,) 92 U. S. 202: Strong, J.

of the opinion treats the condemnation, attacked by the side suit, as of civil character.

The doctrine that the proceedings *in rem* are criminal actions *in personam*, pervades later decisions,¹ so far as to exclude the settled principle that the default of all persons is final when not corrected by writ of error, and that it necessarily cuts off all collateral attacks by such persons, unless based upon jurisdictional ground; for, if the proceedings were to punish an offender, the default of all the world was a work of supererogation. Only by adopting the criminal theory; the theory that the proceeding *in rem* was a trial to punish treason, could the court conclude that the *res* must be shorn to a life estate, and that defaulted persons remained unaffected. But, though such conclusion was thus reached, it was at the sacrifice of the constitutional provisions which require personal trial in all proceedings to punish offenders.

§ 253. **All Under the Same Sections of One Statute.** Without further presentation of these adverse decisions, it should be explained that every proceeding *in rem* discussed or disturbed therein by the Supreme Court really was an action against the second class of things in which the *jus in re* arises solely from enemy ownership; and that the field of conflict is further narrowed by the fact that all of those proceedings so discussed were under one act of Congress expressive of the will of the political power that the government should avail itself of the law of nations to confiscate certain designated classes of enemy property.

The conflicting cases, being thus reduced to narrow ground, will be fully effaced with regard to the one feature just now being considered, (and which is indicated by the title of this chapter,) by other decisions emanating from the same court, upon condemnations of property belonging to the same class and seized and condemned under the same act: "An Act to Suppress Insurrection," etc., and under the same sections.²

§ 254. **Ruled Repeatedly that Property is not Condemned**

¹ Pike v. Wassel, (4 Otto,) 9 U. S. (12 Otto,) 102 U. S. 132; Waite, C. J. 711; Waite, C. J.; French v. Wade, ² 12 Stat. L., p. 590, §§ 5-8.

to Punish Offenders, Under those Sections. In a case¹ in which railroad stock had been seized and condemned in Michigan, under that act, the court held that the seizure of the *res* was necessary to the jurisdiction; that the default of all persons was regular; that the finding of facts was a finding against the *res*; that the fact of the property being hostile was a jurisdictional fact; that the judicial warrant was for the purpose of bringing the *res* under the control of the court; that the notice was to give citation to the world; that the confiscation sections of the act cited authorize and regulate the confiscation of certain species of enemy's property by virtue of the law of nations; that rebels are enemies, and their property, enemy property; that the Constitution imposes no restriction upon the power to prosecute war or to confiscate enemy's property; and that the act contains four sections on criminal law, providing for the personal prosecution of offenders but that the following four, upon which alone the confiscation cases rest, are entirely civil in character and are directed against property and not persons. And they sealed their opinion with a decree affirming the unconditional confiscation of the *res*.

In a proceeding *in rem*, where land was the *res*, brought under discussion in a suit to eject the purchaser,² the Miller case was closely followed and all its doctrines reaffirmed; and the court said of the act of 1862, that it was "designed to introduce the principle of confiscating enemy property seized on land like that seized on water." All the objections to the act—that it was penal—authorized personal punishment without personal trial—provided for condemning the offender without having witnesses confront him, etc., were made in those two cases, and were met by the court with the impregnable legal position that the proceedings authorized by the act were *in rem*, and therefore not criminal or personal actions.

In the next case to be noticed,³ the two foregoing were reaffirmed; and of the Miller case, the court said: "To the doctrines laid down in that case, we adhere." In the Slidell and

¹ Miller v. United States, 11 Wall. 292. Miller, J.

² Brown v. Kennedy, 15 Wall. 591:

³ Tyler v. Defrees, 11 Wall. 331: Strong, J.

Conrad cases,¹ the court decided that "the liability of the property" was the only subject of the inquiry; that "no judgment was possible against any person;" that, in the proceedings, "persons were referred to only to identify the property;" that in the confiscation act, "reference to the ownership was the mode selected for designating that which was made liable to confiscation;" that "everything necessary to a common law proceeding *in rem* is found in the record;" that service was sufficiently made by publication, and that it was not necessary to "conclude against the statute" because that form is "inapplicable to civil proceedings."

Semmes' case² would be perfectly conclusive, even if it stood alone. It accords with the general doctrine of the civil character of the *actio in rem*; and the court said: "Such proceedings under the confiscation act in question are justified as an exercise of belligerent rights against a public enemy, and are not, in their nature, a punishment for treason."

Which set of decisions is to prevail: that first presented in this chapter holding the action against hostile things, under the statute and joint resolution, criminal; or, that last presented, showing it civil? If it be said that some of the former set are later expressions from the Supreme Court, than are found in *Miller v. The United States*, *Tyler v. Defrees*, "The Confiscation Cases," and Semmes' case, the answer is that these cases sustaining the civil character of the action are cited with approval in the later cases; that these cases are all later than *Douglas v. Forrest*—the case which the erroneous decisions followed; that these cases are in harmony with legal science and with settled doctrine, while the irreconcilable rulings to the effect that the confiscations were personal and criminal are thereto repugnant; and finally, that the latter, (excepting McVeigh's) were collateral actions, based upon no jurisdictional ground.

§ 255. **No Legislation Creating any Exception to the Settled Doctrine.** Do proceedings against hostile things under the act

¹The Confiscation Cases, 20 Wall. 92-115: STRONG, J.

²Semmes v. United States, 1 Otto. 21: Clifford, J.

form any exception to the general rule as to their civil character, by reason of the "Joint Resolution Explanatory of the Act," passed by Congress? The resolution has been coupled with the Act, in the foregoing discussion of the cited cases; so but a word need be added in reply to the question as now put.

Had the legislative department of the government, by its explanation or exposition of the Act, attached a *proviso* to the confiscation sections of it, so as to have made them verbally authorize the criminal and personal prosecution of an enemy by procedure against his property without indictment by grand jury, criminal information, trial by a petit jury, personal arraignment, personal opportunity to defend *in propria persona* or by counsel, and personal sentence, they would have verbally authorized what they could not legally and constitutionally empower any court to do. Had the judicial department attempted to sustain such a *proviso*, written in plain words, it would have discovered itself barred by the Constitution at the very threshold. The profession would hardly have patience to bear with an argument to prove that actions against things are not actions against persons, and that criminal inhibitions are inapplicable to civil cases.

Had not the hypothesis been adopted, that confiscation is to punish offenders for acts done, the conclusion could hardly have been reached, in the ejectment suits above mentioned, that the proceedings *in rem* had affected only the alleged owner of the *res*, though all persons had been defaulted; that heirs of an enemy could recover his property at his death, as though he had been criminally convicted of treason; and that courts could exercise jurisdiction over the subject-matter of such proceeding after its exhaustion; but, on the contrary the decisions in those ejectment suits would have been kept in line with the antecedent proceedings *in rem* by the maintenance of the pleas of *res judicatæ*.

§ 256. **The Cases Noticed in this Chapter do Not Belong to Proceedings Against Things Guilty.** The question propounded in the title of this chapter may seem to have been answered with undue brevity; but it must be remembered that the only object of meeting here the cases which, if left unexplained,

would have seemed in conflict with the whole tenor of this book and with all the authorities cited concerning offending things, is to show that those cases do not really belong to the first division in the classification of things; that the leading error of those decisions consists in treating the property as guilty, when it was hostile, conducing to the greater error that persons could be punished for crime by the prosecution of things. Sufficient has been said to show that the discordant decisions may be properly relegated to the next book, since they evidently have no rightful place in this.

BOOK III.

ACTIONS AGAINST THINGS HOSTILE.

CHAPTER XXIX.

JUS IN RE FROM ENEMY OWNERSHIP.

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§ 257. **Enemy Ownership.** Hostile property is that which is held by an enemy in war. Simple ownership of a thing by an antagonistic nation, or by any of its citizens, or by any stranger residing in an enemy's territory, renders it hostile property. It is not necessary that some hostile act should be done in, with or by a thing, to render that thing hostile. It is true that hostile use implies hostile ownership and gives rise to the enemy character of the article used; but there need not be such use to render property hostile. An enemy's ship acquires its *status* by being owned or possessed before it has actually broken a blockade, carried contraband goods or engaged in actual hostilities. An enemy's land acquires its *status* by being owned or possessed, though it may not even be susceptible of actual use in war, further than its contributing to the wealth and strength of the foe.

All property owned, or possessed by the enemy is presumed

to be conducive to his strength and to be in use, directly or indirectly, in furthering his belligerent purposes. The presumption is not merely that of intent to use, but of actual use in contributing to his resources, in strengthening the sinews of war, in prolonging the strife, in injuring the nation against which he fights. This is presumed; and it is a presumption that admits of no rebuttal under the law of nations. Denial of the enemy character may be pleaded in litigation concerning property proceeded against as hostile, but there can be no rebuttal of the presumption of hostile use, while the hostile *status* is uncontroverted. And, as a matter of course, such denial must be by a friend and not a professed enemy, since the latter has no standing in the courts which he is fighting to destroy.

It will be seen, therefore, that the doing of acts such as using a ship in the fighting of a battle or in breaking a blockade is not necessary to the acquirement of the hostile *status*, but that the simple ownership of a ship by an enemy gives it the enemy character. It will also be seen, on the same principle, that the doing of any act by or with a tract of land, is not necessary to such *status*, but that simple ownership by a foe renders the thing hostile.

§ 258. **Possession and Control give Property Character.** Technically legal ownership is not the criterion. Possession, control and power to use, render property hostile whether personal or real, whether ship or land, whatever it may be, if held by an enemy. And such possession or control is ownership as understood in public law.

Neutrals give their property the enemy *status* the moment they suffer it to aid the enemy in any way. If neutrals carry on such purpose in their vessels, the vessels cease to be neutral, because the owners become enemies as to the vessels; enemies *pro hac vice*. If neutrals engage personally in aiding the foe, they personally cease to be neutrals, and their property of every description becomes hostile in character, as though held by the declared belligerent.

It is not use, therefore, that gives the hostile *status*, since use is swallowed up by the greater and broader consideration: the enemy's power to use. It is use which gives the thing of a

neutral its classification with the things of the enemy; but, once thus classified, its confiscability is owing to nothing more nor less than its enemy character through ownership.

§ 259. **Jus in Re not from Offensive Use.** Hostile and guilty things are directly opposite in this respect: the former do not require that some hostile act should be done in, with, or by their use, to render them confiscable; the latter do require that some offensive act should be done, or intended to be done, (or some legal requirement omitted in contravention of law,) in order to render them forfeitable.

It is impossible that guilt, even by fiction of law, can enter into the question of the confiscability of a naval prize or of enemy property of any sort, for the reason that the foreign enemy is not amenable to the laws of the country proceeding to confiscate it; or if he be a domestic enemy, the proceeding is not against his property as that of a guilty citizen but as that of an enemy, so as to treat him, for the purposes of the action, as though he were a foreign enemy. Indeed, there is not a whit of difference between an action *in rem* against the hostile property of a foreign enemy and such action against that of a citizen enemy. Neither prize law, nor the law prescribing the mode of procedure against certain classes of hostile property seized upon land in our own country, makes any distinction in this respect. A ship under the prize act, or a dwelling house or ship libeled under one of the confiscation acts during the rebellion, whether belonging to a rebel or to a foreigner, would be condemned on account of its hostile *status*. A libel under one of the last mentioned acts, against the land of a confederate general, must be drawn precisely like a libel under the same act against the land, situated in this country, of a confederate agent for negotiating rebel bonds, who is a foreigner, residing abroad, and who is not, and never has been even a resident of this country, or in anywise under allegiance to our government, nor amenable to its laws, nor capable of any culpability against the statute by his act of negotiating such bonds abroad. If it is clear, in the latter case, that the property is not condemned for imputed guilt but for imputed hostility, it is equally clear in the former. The offenses of which domestic enemies may be

guilty do not enter as an element, into the trial of their things to ascertain the *status* of those things, by the law of nations, as authorized by municipal statute. It is no more for treason and rebellion that land is confiscated, than it is for these or any other crimes or offenses that prize ships are confiscated. Proceedings against both species of property are authorized and regulated by statute, but the governing law is that of nations.

§ 260. **Elimination of the Right.** That the right to take hostile property is found in the enemy ownership or control of such property is a proposition well settled, as will be shown from the civilians and from English and American jurists and decisions of our Supreme Court; and, upon the truth of this proposition, rests the constitutionality of confiscation; for, if the right to take depends upon previous offensive use of such property, or upon the previous creation of a lien, it follows that the *jus in re* is wanting, and procedure against enemy property is therefore without constitutional warrant. For instance, by the theory assumed when the cases cited in the first part of the last chapter of the second book were rendered, the *jus in re* was altogether eliminated. A clause of the Constitution and a clause of a resolution held of like import, (both applicable to criminal trials *in personam* and neither applicable to civil actions *in rem*,) were invoked to limit the confiscation as in case of treason, showing that the belligerent right to take enemy property was altogether overlooked. Logically, the theory should have led to the conclusion that the proceedings *in rem*, collaterally passed upon in those cases, were all null and void; for, if they were for the punishment of persons for treason, the Constitution required indictment and personal trial on the one hand, while it inhibited, on the other, proceedings *in rem* without a *jus in re*. The citations were followed by others, fully antidotal, in the chapter mentioned; and it may be confidently said that the authors of those opinions never contemplated the disturbance of the settled doctrines that enemy ownership or control of property gives the opposite belligerent nation the right to take and appropriate it.

§ 261. **The Jus In Re by the Law of Nations.** The right

to take things from the enemy just because they are held by the enemy is coeval with the right to hurt him. It arises from the necessity of the case. Given a state of war, the right to take property arises with the right to take life, since both are included in the term *war* as understood in the law of nations and as used ever since men first began to fight battles. To cripple the enemy's resources, to strip him of his arms and of means of acquiring arms, to take his property and his life, become methods of self-defense as well as of aggressive warfare with the view of bringing the contest to a close.

The right may also be said to arise from the circumstance that such property is owned by nobody whose proprietorship the capturing or seizing nation is bound to respect. Such nation is not bound to respect any rights of property as existing in enemies;—that is, under the law of nations as unmitigated by modern usage, treaties, and the nation's own constraining sense of justice and propriety. In considering the source of the *jus in re*, we have nothing to do with the modern restrictions: the right arises under the law of nations in its broadest application, and is found included in the right of war itself, in the right of national self-defense, in the right to take that which belongs to no one whose ownership the seizing belligerent nation is bound to regard. The subjects of one belligerent have no right to prey upon the property of those of the opposite party, but the sovereign may seize or capture it.

§ 262. **The Right Explained by the Civilians.** The civilians are uniform as to the *jus in re*, and are fairly represented in the following extract from Grotius:¹ “A State, taking up arms, in a just cause, has a double right against her enemy: *First*, a right to obtain possession of her property withheld by the enemy, to which must be added the expenses incurred in the pursuit of that object, the charges of war and the reparation of damages; for, were she obliged to bear those expenses and losses, she would not fully recover her property nor obtain her due. *Secondly*, she has a right to weaken her enemy, in order to render him incapable of supporting his unjust violence; a

¹ Grotius De Jure Gentium, Lib. iii., c. vi.

right to deprive him of the means of resistance. Hence, as from this source originate all the rights which war gives us over things belonging to the enemy, we have a right to deprive him of his possessions; of everything which may augment his strength and enable him to make war. This, every one endeavors to accomplish in the manner most suitable to him. Whenever we have an opportunity, we seize on the enemy's property and convert it to our own use; and thus * * * in a word, we do ourselves justice."

And this learned commentator had remarked, in a previous chapter, that *jure gentium voluntario*, the whole property of the individual members of a State is responsible for the debts or obligations of the State or sovereign.¹ And Vattel says that the property of individual citizens, in the aggregate, is to be considered, with regard to other States, as the property of the nation itself.²

Professor Martens, of Gottingen, thus condenses his statement of the right: "The conqueror has a right to seize on the property of the enemy, whether movable or immovable. These seizures may be made: 1st, in order to obtain what he demands as his due or equivalent; 2d, to defray the expenses of the war; 3d, to force the enemy to an equitable peace; 4th, to deter him, or, by reducing his strength, to hinder him from repeating, in future, the injuries which have been the cause of the war. And, with this last object in view, a power at war has a right to destroy the possessions and property of the enemy, for the express purpose of doing him a mischief."³ To which four grounds of right, may be added the general one, covering the whole hostile *jus in re*: the enemy having no proprietary rights which the opposite belligerent is bound to respect, the latter becomes entitled to property captured because there is no other recognizable ownership. In a word, the belligerent right to take the property of enemies, is as well settled as the right to take their lives.

However certain civilians have differed about the policy of

¹ Grotius De Jure Gentium, Lib. c. vii., §§ 81, 82.
iii., c. ii., § 2, par. 1.

² Vattel, Droit des Gens, Liv. ii., Nations, Lib. viii., c. iii., § 9.

³ Martens' Summary of the Law of

confiscating some descriptions of enemy property, and about the modern usages of nations thereto,¹ yet they all find the *jus in re* in the fact of enemy ownership, and hold that it must be pre-existing to authorize confiscation.

§ 263. **Concurrence of English and American Jurists.** The English jurists, such as Lord TENTERDEN and Lord STOWELL, in all the prize confiscations decreed by them, have followed the civilians, and found the right in enemy ownership; and so have those of our own country who have been best conversant with the subject, notably Chief Justice MARSHALL² and Judge STORY; indeed, all the judicial minds of both countries have been unanimous on this subject, so far as concerns prize confiscations; and the many cases in point, referred to in our chapter of this book on that subject, need not here be cited. Our Supreme Court have fully applied the principle to the property of domestic enemies.

In "the consolidated prize cases,"³ they held that the civil war "between the United States and the so-called Confederate States, had such character and magnitude as to give to the United States the same rights and powers which they might exercise in the case of a national and foreign war;" that "all persons residing within the hostile territory, whose property may be said to increase the resources of the hostile power, are, in this contest, liable to be treated as enemies, though not foreigners;" that citizens are "none the less enemies because they are traitors;" and that "it is not unconstitutional to treat the property of domestic enemies as though it were the property of foreign enemies." In this, they followed the doctrine laid down long before, on the subject of the confiscation of enemy property in civil wars, as in international wars,⁴ whether found on sea or land.⁵ With these decisions, and those of "the consolidated prize cases," the subsequent cases under the prize acts

¹ Bynkershoek, Lib. i. 1, c. vii.; Puffendorff, Lib. i. 8, c. vi.; Vattel's *Droit de Gens*, Liv. iii., c. v.; Grotius' *De Jure Gentium*, Lib. iii., c. vii.

² *M'Culloch v. State of Md.*, 4 Wheat. 413 *et seq.*

³ *The Amy Warwick*, Crenshaw,

Hiawatha and Brilliante, 2 Black, 636.

⁴ *Rose v. Himley*, 4 Cr. 272; *The Santissima Trinidad*, 7 Wheat. 306. Vide the case of *Brown v. United States*, 8 Cr. 121.

⁵ *Brown v. United States*, 8 Cr. 148.

have been in accord, on the rule that the *jus in re* is found in the enemy ownership.¹ So, also, in the confiscations under the non-intercourse acts,² and those relative to insurrection.³

§ 264. **Hostility of Property a Fiction of Law.** The hostility which gives rise to the *jus in re*, is a fiction of the law of nations, just as the guilt which gives rise to the *jus in re* in a suit against a guilty thing is a fiction of municipal law. The hostility of the owner or possessor is imputed to his property. The question, when the *status* of property libeled as hostile is in dispute, is not whether it is by fiction of law guilty or innocent; but whether it is by fiction of law hostile or friendly. A thing may be innocent, yet confiscable as hostile; a thing may be guilty, yet releasable as friendly. The idea of guilt does not enter into war at all, nor the idea of hostility into municipal forfeitures at all. If intermixed by legislator or expounder, they are almost sure to constitute a compound difficult of analysis. They are indeed incongruous elements which courts and pleaders should keep apart.

Keeping steadily in mind that condemnations of naval prizes and of enemy things real and personal seized upon land are nothing more than judicial declarations of the hostile *status* of such captured or seized property; that the right to such things arises under the law of nations; that the right is precisely the same whether the *res* belongs to a foreign or a domestic foe, since hostility and not guilt, gives *jus in re*, let us now inquire whether our own government has constitutional warrant for proceeding against hostile property, real as well as personal.

¹ The *Andromeda*, 2 Wall. 404; Chase, C. J.; The *Venice*, Id. 258; Chase, C. J.; The *Sallie Magee*, 3 Wall. 451; Swayne, J.; The *Hampton*, 5 Wall. 375; Miller, J.

² The *Ouchita Cotton*, 6 Wall. 521; The *Cotton Plant*, 10 Wall. 577; *Vide*, United States v. Weed, 5 Wall. 62; Mrs. Alexander's Cotton, 2 Wall. 404; The *Hampton*, 5 Wall. 372; Radich v. Hutchins, (5 Otto,) 95 U. S. 210.

³ Union Insurance Co. v. United

States, 6 Wall. 259; The *Foundry Cases*, 6 Wall. 765; Morris' Cotton, 8 Wall. 507; United States v. Hart, 6 Wall. 772; Semmes v. United States, 91 U. S. 21; Miller v. United States, 11 Wall. 292; Tyler v. Defrees, Id. 381; Brown v. Kennedy, 15 Id. 591; The Confiscation Cases, 20 Wall. 116. *Contra*, Bigelow v. Forrest, 9 Wall. 339; McVeigh v. United States, 11 Id. 259; Day v. Micou, 18 Id. 160; Burbank v. Conrad, 96 U. S. 291;

CHAPTER XXX.

THE CONSTITUTIONALITY OF CONFISCATION.

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§ 265. **The War Powers Conferred by the Constitution.** The people of the United States compose a nation with all the rights of a nation. The nation is sovereign. Sovereignty is necessarily a unit; it cannot possibly be subdivided. While every citizen of the republic is literally a sovereign, the sovereignty is lodged with the entire citizenship. It cannot be exercised directly by many millions of sovereigns as it is by one in an absolute monarchy, and, therefore, the exercise must be delegated. The exercise of the sovereignty of the people of the United States is delegated to the Federal government and to the State governments. Those powers entrusted to the Federal government are expressed or implied in the Federal Constitution, which is the supreme law of the land.¹ Among the powers so entrusted is that of war, with all its concomitants as known to the Law of Nations. As a nation, the people of the

Armstrong's Foundry, 6 Wal. 759. *Indecisive*: Wallack v. Van Riswick, 92 U. S. 202; Pike v. Wassel, 94 U. S. 711; French v. Wade, 102 U. S. 132.

¹ United States v. Keokuk, 6 Wall. 514; Riggs v. Johnson County, Id.

166; The Moses Taylor, 4 Wall. 411; Pensacola Tel. Co. v. W. Un. Tel. Co., 96 U. S. 1; Tarble's Case, 13 Wall. 397, 406; Duncan v. Darst, 1 How. 301, 310; Sinnott v. Davenport, 22 How. 227.

United States have the rights of war belonging to all nations, and neither more nor less; and all of those rights are entrusted for enforcement to the general government. We are to look to the Constitution for the warrant, and there find that "Congress shall have power to declare war;" "to raise and support armies;" "to make rules concerning captures on land and water;" "to provide and maintain a navy;" "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" "to define and punish * * * offenses against the Law of Nations;" "to provide for the common defense and general welfare," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." In executing those constitutional war powers, Congress may select the means—one or more; may use any appropriate means for these ends. The Constitution leaves Congress the judge of what is appropriate, provided it do not decide upon means expressly or impliedly inhibited by that instrument. Congress is not confined to what is both necessary and proper in the selection of means: that which is not inhibited, and is, in the legislator's opinion, "proper," may be resorted to, though it be not absolutely necessary or indispensable.

§ 266. **The Powers Include the Means.** Is the confiscation of enemy property a proper means of supporting the army, of repelling invasion, of bringing the enemy to terms? No one would give other than an affirmative answer to this question, with reference to property of a foreign enemy. The confiscation of such property is not only justifiable as a means, but it is clearly covered by the authority to declare war, and is sometimes one of the ends of war. And the authority to make rules concerning captures refers necessarily to the capture of enemy property. Armies called out to suppress domestic insurrection require pecuniary means of support as well as those organized to repel invasion or to prosecute public war of any character, and Congress may select the means of that support. Making rules concerning capture is not confined to the regulations concerning the establishment of prize courts and directing the methods of military and naval conquests, but must be

understood to apply to seizures upon land and water as well as to captures technically so called.

§ 267. **Such Powers and Means not Limited to Public War.** The right to declare war is not limited to the declaration of public war. The right to provide for the common defense is not hindered by inhibition to use the ordinary means of warfare against a domestic enemy in a civil war. Civil wars are governed by the same rules, on the subject of the confiscation of enemy property, as international wars; and it does not matter whether such property be found on land or sea. The civil war in this country had such magnitude and duration and general character as to give to the United States the same rights and powers which they might have exercised in an international war, and against a foreign foe. The territory held by the belligerents was clearly defined, and all persons residing within it, whose property might be said to increase the resources of the hostile power, were liable to be treated as enemies, and their property, as enemy property. Congress had declared the inhabitants of that territory to be in a state of insurrection; the president had proclaimed it, and the courts necessarily had to be governed, on the subject of the *status* of those inhabitants, by the decisions and acts of the political department of the government.¹

The right of the political department of the government so to declare is expressed in the warrant to suppress insurrections, execute the laws by military force, and do whatever might be proper to effect these ends; and it is abundantly implied in the general authority to declare war. The term *war* is used in the Constitution in the full legal sense in which it is always used in the Law of Nations by the many learned commentators on the subject; it is a word with significance well defined.

§ 268. **The War Powers of the Constitution Identical With Those of the Law of Nations.** Whatever war powers exist under the Law of Nations, exist under the Constitution

¹ *Luther v. Borden*, 7 How. 1; *States v. Palmer*, 3 Wh. 610, 634; *Gelston v. Hoyt*, 3 Wh. 246, 324; *The Venice*, 2 Wall. 258, 274; *The Santissima Trinidad*, 7 Wh. 337; *Peterhoff*, 5 Wall. 28, 60; *The Prize Rose v. Himely*, 4 Cr. 272; *United Cases*, 2 Black, 673.

of the United States. There are loose writers who treat of war powers as something outside of the Constitution, to be resorted to *ex necessitate* during a state of war, but which have no warrant in that instrument. A political corporation which has not all the rights and powers, including those of war, which are absolutely necessary to its existence and preservation, is less than a nation. The people of the United States being a nation, have such rights and powers, most assuredly; and the exercise of those rights and powers is not only delegated to the Federal government for exercise, but is prohibited the other agents, the State governments.¹

§ 269. **Founded on Natural Right.** A nation is an aggregation of individuals, and has all the rights of attack and defense that a man in a state of nature would have by natural law. Whatever is right in itself, such a one could lawfully do. Whatever is right in itself, a nation may lawfully do. There being no parliament or tribunal of nations to agree upon rules of right, we may say in general that the true law of nations, as of an individual person, is the law of God. Certainly both communities and individuals are bound to act justly, mercifully and reasonably. Morality is incumbent upon both. The law of nations is summarily written in the ten commandments.

It is not unjust, unmerciful or unreasonable for a man or a nation to defend when attacked. Both may not only take the antagonist's weapons, and all that goes to strengthen the enemy, but even his life, if necessary. A nation, in self-defense, may not only cripple the resources of the enemy, seize them, appropriate them, destroy them, but he may also take the life of the enemy.

A nation should never unjustly attack, but it is the sole judge of the justice; and, when it decides to attack, it must, for the purpose of our inquiry, be presumed to have decided justly. As a just declarer of war, it may humble and defeat the enemy by taking anything that he has and by killing him; shooting down thousands of his soldiers on the field, horrible as the

¹ Const. Art. 1, § 10.

resort appears; taking from him, on sea or land, whatever he has: for wealth strengthens the enemy and tends to prolong strife, while the object of war is to conquer a peace.

The right to injure enemies by killing them, and the right to use the less severe means, (the taking of his money, credits, ships, lands, everything,) is all implied in the term *war*. Nations, like individual men, fight to whip.

§ 270. **Restraint to the Use of Means.** There is absolutely no limit to the means that a nation may use against its enemy, except the restraint of the moral law. Of course there may be treaty restraints; and there have been many treaties made between nations, several between the United States and other contracting powers—notably those with France, England, Holland, Prussia and Morocco, all before the commencement of the present century, (to say nothing of later treaties,)—by which it was agreed that debts should not be confiscated: an exception which admits the rule. What is called the modern modification in the law of nations relative to the confiscation of rights, credits and property found on land, has no further existence than so far as it is expressed in conventions between different powers; and so far as any particular nation, in the absence of a stipulation with another, chooses to give it effect. As people grow better, and understand more clearly their moral obligations, it is to be hoped that they will agree still further to modify the rigors of war, and consent to avoid killing each other; content themselves with wounding and confiscating: but while war means fighting for the mastery, the belligerent has all the rights of war, if he choose to exercise them all.

§ 271. **Civil Law Views.** The views of some of the Civil Law writers, among them Vattel, that usage to the contrary has abrogated the right of nations to appropriate the credits due to enemies at the breaking out of a war, will not stand the test of reason, except so far as the plighted honor of the nation should restrain it from such appropriation. No nation has a right to act dishonestly, under the Law of Nations or any other code, written or unwritten. But every nation, in the absence of treaty, being its own judge, may not consider that, in every species of war, it would be dishonorable to cover into its treas-

ury such means of war as might be derived from the collection of sums due to an enemy's subject, which otherwise would go to strengthen the sinews of the foe. Certainly there are cases, growing out of commerce, where a foreigner may have either debts due him or property held by him, (for there is really no difference,) in the hostile country at the commencement of hostilities. Good faith with that foreigner, who had been allowed, and virtually invited, to trade in that country when it was friendly, would require that he be allowed time to get out both his person and his property. But, if he be known as one of the originators of the war, good faith would not require that he have this indulgence. Nor does it require that insurgents against their own government, who produce a state of war, should be allowed to plead modern modifications in the law of nations to exempt their debts due them or property held by them, from the general rule: for the general rule is not modified, except so far as any particular nation has thought proper to restrain itself. Such insurgents need not invoke war; they act knowingly; they know that their government must try to bring them to submission, and must weaken and even destroy them if necessary for the purpose. Not only insurgents may be thus treated, and may be thus esstopped from pleading that good faith requires that their effects should be inviolate, but the most enlightened civil law writers on the law of nations extend the rule, in all its rigor, to every species of enemy. On this general principle, Bynkershoek, and Grotius, and Puffendorf, and Burlamaqui, and Rutherford, and Emerigon, and Martens seem well agreed; and the arguments of Vattel and Azuni, who contend that good faith would require that time be given to an enemy's subjects to take their persons and property out of the country, after declaration of hostilities, merely set up an exception to the general doctrine.

§ 272. **The Civilians Reconcilable.** The slight differences between the civilians on the subject arise mostly from the viewing of the question from different standpoints. One considers what should be; he has the true ideal of justice among nations; and, were he a delegate to an Amphictyonic council of nations, his argument would be excellent. And he might go

further, and contend for the fullest suffusion of all nations with brotherly love; and all that he could get enacted towards that end would be commendable; though still, in war with a nation not represented in the council, he would find himself obliged to resort to such means as would hurt. Another civil law commentator considers what has been, among the particular nations to which his attention and his reading have been especially turned; and, whatever these have done towards modifying rigors, he writes down as emendations to the system. A third writes of nations as they are, and of war with its stern necessities; and, while he may not less deplore the inhumanity of the practice than his brothers, he meets the subject with all its horrible facts, and concludes that the law of nations, in recognizing war, recognizes the right to kill and capture on land and sea.

§ 273 **Effect of a Declaration of War.** The right exists upon the declaration of war, or a recognition of the existence of a state of war by the political power of a government, and may be immediately exercised. Confiscation is a right incident to war.¹

It is only important here to remark that so soon as the owner becomes an enemy, the thing owned is tainted with hostility; and that, although no statute may exist, at the time, for its seizure and condemnation, yet upon subsequent passage of such statute, condemnation thereunder would retroact to the moment the thing had become enemy property.

It is well settled in the United States that when the government has declared the purpose, property on land as well as upon water, may be the lawful subject of seizure or capture. Anything that may weaken the enemy or cripple his resources, may be taken. And perhaps nothing after his arms and food supplies and money, can weaken the enemy more than the taking of his land. No exemption of land is made by the laws of

¹ *Ware v. Hylton*, 3 Dal. 227; *Cooper v. Telfair*, 4 Dal. 14; *The Emulous*, 1 Gal. 575-6; *Thompson v. Carr*, 5 N. H. 510, 515; *Asherton v. Johnston*, 2 N. H. 31; *Brown v. Uni-*

ted States, 8 Cr. 122, 123; *McNeill v. Bright*, 4 Mass. 282, 304; *Gilbert v. Bell*, 15 Mass. 44; *Smith v. Maryland*, 6 Cr. 286.

nations or by the Constitution which includes those laws, nor could any be made without doing violence to common sense.

It is not always expedient to resort to the confiscation of lands, but in the late contest Congress judged it expedient and authorized it to a limited extent. The right to confiscate the lands of all the insurgents included, of course, the right to do less; and, for reasons that will readily occur to the reader, Congress ordered only the more influential classes of the domestic enemies to be touched in their property, real and personal. And even they were to be given an opportunity to appear as claimants in court, to deny their enemy character and affirmatively aver their right to the property and make out such a case as would prevent the government, in defending against such claim, from condemning the thing proceeded against, if the law and the facts were with them. The principal statute authorizing such procedure distinctly declares that if such property, "whether real or personal, shall be found to have belonged to a person engaged in rebellion, the same shall be condemned as enemies' property and become the property of the United States."¹

§ 274. **Enemy Property does not Acquire its Status from Statutes.** Now it is evident that neither the passage of that act, nor judicial condemnation under it, gives enemy property its *status*. The act could do nothing more than authorize procedure against it, (if such authorization is necessary, as some suppose,) adopt the methods, regulate the sales and dispose of the proceeds; the condemnation merely finds that the *res* is enemy property, and declares it such, and sentences it for hostility; but the enemy character, the hostile *status* of the thing proceeded against, must have been previously acquired. So soon as an owner, whether a citizen or not, becomes an enemy, all his property becomes enemy property, and is immediately liable to be captured or seized as such, and proceeded against in such way as Congress may determine. Nations may decline to seize or capture it, but it is liable to seizure and capture nevertheless. It is just as much a hostile thing when it is land or personal property upon land, as it is when in the form of a ship,

¹ 12 Stat. L. 591.

upon water, owned by an enemy. No writer contends that the latter cannot be captured at once, without awaiting legislative expression of the government will to have it done. There is no less right to seize and capture enemy property on shore, except that it is not invariably the practice among nations to seize such things, and therefore there is not the same assurance that government designs to do so in any given war.

So far as the law of nations is concerned, no difference exists between a thing at sea and a thing ashore, as to the time when either may be proceeded against after the enemy *status* has been acquired,

§ 275. **Statutes Regulating the Exercise of the Right Find Warrant in the Constitution.** But the statutes for seizing hostile property wherever found not only find warrant in the power to declare war, and to do whatever war means in the law of nations, but there are other powers given to Congress which authorize such laws. The express grant of power to make rules concerning captures on land and water, covers the case. It is true there is a difference, in legal parlance, between seizure and capture, but so far as concerns the grant, such a distinction would be too fine. If seizure is not expressed in the grant, it is clearly implied. And, whatever authority there is for seizing, extends to all such seizures of enemy things as may not be technically called captures.

§ 276. **No War Powers in the State Governments.** The powers entrusted by the people to the state governments for exercise embrace none of those above enumerated and discussed.¹ There can be no allegiance due to a state, of such a character as to be in conflict with that due to the national government. States exist as *de jure* governments, under our system, only so long as they remain in accord with the general government.

When several of them, by changing their constitutions, made

¹ *McCulloch v. Maryland*, 4 Wh. 316; *Cohens v. Virginia*, 6 Wh. 419; *McIlvaine v. Cox*, 4 Cr. 209; *Buckner v. Finley*, 2 Pet. 586; *Bank of United States v. Daniel*, 12 Pet. 32; *Rhode Island v. Massachusetts*, 12 Pet. 657; *Dodge v. Woolsey*, 18 How.

336; *United States v. Reese*, 92 U. S. 214; *United States v. Cruickshank*, Ib. 542; *Pennoyer v. Neff*, 95 U. S. 714; *Crandall v. Nevada*, 6 Wall. 35; *In re Steamboat Josephine*, 39 N. Y. 19.

those instruments repugnant to the national Constitution—as by requiring officers to swear allegiance to the Confederate States of America—they forfeit their *de jure* character.

But, as they yet governed their former domain, they remained *de facto* state governments. They were such, however, only as to state functions—not as to their assumed national functions or belligerent character.

Of course it is well settled that the Confederacy had no existence as a *de facto* government, since it did not extend over the whole realm of the United States.

What follows in this work on the subject of the insurrectionists being treated as enemies, and the portion of the republic which they dominated for a time being treated as enemy territory in the application of the principles of war to the insurgents as a matter of convenience and necessity, should mislead no one into the impression that the late war was one between states, or that the insurgents had any legitimate title to belligerent rights.

CHAPTER XXXI.

STATUS OF PROPERTY IN PUBLIC AND CIVIL WARS.

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§ 277. Effect of Public War Upon Enemy Property.

When a sovereign power prosecutes its rights by force of arms against another sovereign power, public war exists.¹ It exists, whether there has been any proclamation of war or not, though many writers have contended that it does not legally exist unless declared by the sovereign. In this they follow Grotius who says that the Law of Nations demands such declaration though the Law of Nature does not.² Emerigon,³ Vattel⁴ and Puffendorf⁵ support this position, though Bynkershoek⁶ takes the opposite view. Other writers, among them Lord Stowell, following Bynkershoek, take the sensible ground that war may exist, and lawfully exist, without a formal declaration by either belligerent.⁷

The existence of war is a fact; and, when nations are fighting and killing each other, it cannot alter that fact if one should show that the contest had not been previously declared in due

¹ Bynkershoek, *Quæst. Jur. Pub.* Liber i., c. 1, § 1; Albericus Gentilis, *De Jure Belli*, Lib. i., c. 2; Grotius, *De Jure*, Lib. i., c. 1, § 2.

² *De Jure*, Lib. iii., c. 3, § 6.

³ *Traite des Assurances*, i., 563.

⁴ Liber iii., c. 4, § 51.

⁵ Lib. vii., c. 4 § 9.

⁶ *Quæst. Jur. Pub.* i., c. 2.

⁷ *The Eliza Ann*, 1 Dodson, 247.

form, either by the ancient method of announcing it by heralds or the more modern form of printed proclamation.

War between the governments of two nations renders all the people of the two mutually hostile, since the governments represent the will of the two peoples respectively.¹ And it renders the property of the two warring nations mutually hostile; or to express the idea more clearly, it renders the property of either nation hostile to the people of the other nation. And this is entirely independent of individual opinions or of the quality of the property.

Though the existence of war is a fact, yet it is a matter of importance that its beginning should have a date, since the relations of the contending people are so radically altered with regard to commerce and other matters, by the commencement of war, that it is necessary for the courts to know when the altered conditions were created. This period must be fixed, in some way, by the political power of government.

As there can be no exchange nor sale of goods between belligerents, commerce is suspended by war.²

The neutrality of vessels and other property is lost by unlawful commerce with an enemy and the wronged belligerents may declare the *status* of such property to be *hostile*, and may condemn it.³

Commerce, being suspended between belligerents in war, is also suspended between their respective allies; that is, the one party with its allies cannot trade with the other and its allies.⁴ And it has been held that the enemy character is impressed upon property purchased before the commencement of hostilities, as soon as they commence, so that a ship was condemned as trading with the enemy in its attempt to bring such goods out,⁵ but this is subject to exception and qualification.

¹ 1 Kent's Com., 63.

² The Hoop, 1 Rob. 196; Potts v. Bell, 8 Term Rep. 548; Gist v. Mason, 1 T. R. 85, 86; The Bella Guidita, 1 Rob. 207; The Rapid, 9 Cr. 155.

³ The Lord Wellington, 2 Gall. 103; The Lawrence, 1 Gal. 470; The Joseph, Id. 540; The Alexander,

Id. 532; The Mary, Id. 620; The Carolina, 6 Rob. 336; The Rose in Bloom, 1 Dodson, 60; The Jonge Pieter, 4 Rob. 79.

⁴ La Rosine, 2 Rob. 372; The Mary Folger, 5 Rob. 200; The Neptune, 6 Rob. 405; The William Penn, Peters C. C. 106.

⁵ Potts v. Bell, 8 Term Rep. 548.

§ 278. **Rights of War, as to Property, not Modified.** The primary responsibility of property belonging to private citizens or residents of the enemy's country, for the obligations, debts and indemnities due by the enemy-nation, is based on the settled principle always recognized *jure gentium voluntario*, that all the property of the subjects of the sovereign is liable for his liabilities. One nation cannot be expected to bother itself about the individual rights of property in the enemy's country, since it is not bound to recognize the existence of any such rights, but may look upon all the wealth of the enemy nation *en masse* to be held responsible as primarily liable for hostility, and a proper source whence to get indemnity for the expenses of the war, or to enrich itself beyond such indemnity, if it please. This principle, in most of its features, has been held by the civil law writers on the law of nations.¹ And it is so broad as to cover all species of enemy property. That found in the country when hostilities commence; debts due an enemy and accrued before the war; goods of neutrals so connected with the enemy or controlled by him as to strengthen his resources; personal property of every description, afloat or ashore; land, bank stock and all other stocks.

This stern rule has not been modified at all by modern usage, so far as concerns naval prizes, though courts have been lenient where the rule would have worked hardship and injustice.²

§ 279. **Modern Modifications of the Exercise of the Rights.** The rigor of the general rule has been greatly relaxed, with regard to movable enemy property found in the country at the commencement of hostilities; debts due to foreign creditors; moneys in the public funds belonging to enemies; vessels and cargoes afloat in the ports of the countries, till they have sufficient time to go out, after the beginning of war; land belonging to private individuals in a conquered country; libraries, etc., etc.: relaxed in its exercise, we mean. Treaties between leading nations have so often contained stipulations exempting such property from the severity of the rule, that it has become

¹ Vattel, *Droit des Gens*. Liv. ii., c. 7, §§ 81, 82; Grotius *De Jure*, Lib. iii., c. 2, § 2.

² The *Dree Gebroeders*, 4 Rob. 234; The *Madonna delle Grazie*. 4 Rob. 195; The *Jeffro Catherina*, 5 Id. 141.

a sort of common law among the great powers that the rule shall always be considered as relaxed, unless a nation shall make declaration of its sovereign will to avail itself of its undoubted right to carry out the general rule in all its rigor.

Vattel attaches so much importance to the practice of nations in the relaxation of the exercise of some of its rights in this respect, that he even concludes that the rights have been lost, especially so far as concerns the confiscation of debts due the enemy's subjects before the commencement of hostilities. But most of the great publicists of the *jus gentium* hold that the rights exist, whether exercised or not. Among them we may mention Bynkershoek, Puffendorff and Grotius; and Cicero has even said that promises to pay are not to be redeemed when the relation of enemy arises between a creditor and his debtor.

§ 280. **May Enemy Property Seized on Land be Condemned in the Absence of an Authorizing Statute?** The true rule as it now exists; the true distinction between the right to confiscate all hostile things, and the modern mitigations in the exercise of that right, is so fully and learnedly and pains-takingly laid down by Chief Justice MARSHALL, in the case of *Brown v. United States*,¹ that the reader may be happily saved from any other disquisition herein upon this topic.

In discussing the question, "May enemy property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war?" the learned jurist remarks that the right to confiscate debts is precisely the same as the right to confiscate other property; but he adds, "The modern rule would seem to be that tangible property, belonging to an enemy and found in the country at the commencement of the war, ought not to be immediately confiscated." And further: "The Constitution of the United States was framed at a time when this rule, introduced by commerce in favor of humanity, was received throughout the civilized world. In expounding that Constitution, a construction ought not lightly be admitted which would give a declaration

¹ *Brown v. The United States*, 8 Cr. 121.

of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy's property, which may enable the government to apply to the enemy the rule that he applies to us. If we look to the constitution itself we find this general reasoning much strengthened by the words of the instrument. That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, and of giving those rights which war confers, but not of operating, by its own force, any of those results, such as transfer of property, which are usually produced by ulterior measures of government, is forcibly deducible from the enumeration of powers which accompanies that of declaring war. 'Congress shall have power'—'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.' It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water, is to be confined to captures which are ex-territorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to Congress, of the power in question, as an independent, substantive power, not included in that of declaring war." And he concludes that a declaration of war does not, of itself, under the modern rule, authorize the confiscation of enemy property found on land, but that the power of authorizing the confiscating of such enemy property is in Congress. And Judge STORY, in his opinion in the same case, holds that the right is in Congress to order the seizure and confiscation of enemy property found on land, and even the debts due to enemies at the breaking out of a war.

§ 281. **All Confiscable but not all Justiciable.** The doctrine is that all enemy property is confiscable, but that courts can take no judicial proceedings for the condemnation of such species of property as is usually exempt by modern usage, till authorized and instructed so to do by an expression of legislative will to the effect that the political power of the government has resolved to avail itself of its rights, under the law of nations

as incorporated into our constitution, to proceed against such species of property.

This is the doctrine as it exists in our country to-day, and as it is plainly deducible from many decisions which support that of Justices MARSHALL and STORY in Brown's case, among which only the earlier and leading ones need here be cited,¹ though the later are in accord. And the doctrine is fully recognized by Chancellor Kent in his Commentaries.²

The power to declare that enemy property seized upon land shall be confiscated, is a political one; and the general rule applies that the judiciary cannot control political questions.³

§ 282. **The War Right Over Property not Affected by a Co-existing Municipal Right Over Insurgents.** Does this doctrine extend to the property of domestic enemies, in armed rebellion against their government?

As has been said, when war actually exists, it exists as a fact. If a government is warring to subdue insurgents, the fact is as apparent as though an alien enemy were the opposing force: therefore, every reason that exists for crippling the resources of an alien enemy in a public war, applies in favor of weakening a domestic enemy in a civil war. Wherever life may be taken in the prosecution of any war, public or civil, property may be taken. The taking of either rests for its justification on the law of necessity. So long as a nation's legitimate object may be accomplished without killing and confiscating, neither means can be resorted to without horrid repugnance to the law of nature. But, in suppressing rebellion, as well as in subduing a foreign foe, both means must often be applied *ex necessi-*

¹ Ware v. Hilton, 3 Dall. 222, 231; Cross v. Harrison, 16 How. 164, 189, 190.

² 1. Kent's Com., p. 59 et seq.

³ Williams v. Suffolk Ins. Co., 13 Pet. 420; Garcia v. Lee, 12 Id. 511; Foster v. Neilson, 2 Id. 307; Taylor v. Morton, 2 Curt. 454; United States v. Palmer, 3 Wh. 610; Scott v. Jones, 5 How. 343; Luther v. Borden, 7 Id. 1; Clark v. Braden, 16 How. 635; Fellows v. Blacksmith, 19 Id. 366;

United States v. Holliday, 3 Wall. 407; The Cherokee Nation v. Georgia, 5 Pet. 1; Georgia v. Stanton, 6 Wall. 73; Miss. v. Johnson, 4 Wall. 500; The Protector, 12 Wall. 700; Marbury v. Madison, 1 Cr. 166; Jones v. Walker, 2 Paine, 688; Wisconsin v. Duluth, 2 Dil. 406; United States v. Baker, 5 Blatchf. 6; Van Antwerp v. Hulburt, 7 Id. 426; Grossmayer v. United States, 4 Nott & H. 1; The Hornet, 2 Abb. U. S. 35.

tate. If an army of sheriffs, each with his *posse comitatus*, is able to catch and crib all the insurgents of a revolt, without hurting one of them, there would be nothing to justify the application of the harsh measures of war to such rebellious subjects. If, on the contrary, such civil means are impossible; and the sovereign people through their mouth-piece, the chief executive officer, has so proclaimed; and hostile armies are confronting each other, it would be idle to say that here is not a war in fact, with all the rights of war possessed by the sovereign, though the opposing force be composed of citizens.

While the government, in such case, would still possess the legal right to treat the insurgents as citizens amenable to the law, it would also possess, from the very nature and necessity of the case, the right to treat them as enemies, and to exert against them all the power of war. And the latter would be, in this country, a constitutional right, since, as has been seen, the law of nations is incorporated into our organic law.

With respect to the confiscation of property because of its ownership by insurgent or domestic or citizen enemies, our Supreme Court say: "It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation."¹

§ 283. **The Confiscability of Citizen Enemy Property Held by the Supreme Court.** The doctrine that the property of citizens in armed rebellion may be treated as that of enemies, has been fully settled by judicial authority, in this country. It has

¹ *Miller v. United States*, 11 Wall. 308, 313.

been held that civil wars are governed by the same rules, on the subject of the confiscation of enemy property, as international wars.¹

Our Supreme Court applied the doctrine fully to the hostile property of the citizen enemies of the rebellion.²

From the consolidated cases of the *Amy Warwick* and others, above cited, may be deduced the following settled propositions:

I. That the civil war between the United States and the rebellious citizens had such character and magnitude as to give to the United States the same rights and powers which they might have exercised against a foreign enemy in a public war.

II. That "all persons residing within the hostile territory, whose *property* may be said to increase the resources of the hostile power, were liable to be treated as enemies, though not foreigners."

III. That "it is not unconstitutional to treat the property of domestic enemies as though it were the property of foreign enemies."

This decision, of the consolidated cases, was upon naval captures, but there can be no difference between enemy property upon the sea, and that upon land, (in case the political department decides to proceed against the latter,) so far as concerns the constitutional right to condemn either when held or controlled by enemy citizens. In several places, in this decision, the court speak of enemy property without distinguishing between these two kinds; they say,³ "the right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure and destruction of his property, is a necessary result of a state of war."

§ 284. **The Doctrine Applied in Exposition of Legislation.** In a later case the court, discussing legislation of Congress upon the subject, after stating the provisions of the statute which was under consideration, thus strongly reiterated the doctrine: "The question, therefore, is, whether the action of Congress

¹ *Rose v. Himley*, 4 Cr. 272; *The Santissima Trinidad*, 7 Wheat. 306; *Martin v. Mott*, 12 Wh. 29, 32.

² *The Amy Warwick*, *Crenshaw*, *Hiawatha* and *Brillante*, 2 Black, 636.

³ *Amy Warwick et al.*, 2 Black, 671.

was a legitimate exercise of the war power. The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of any enemy, and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right it would be set at rest by the express grant of power to make rules respecting captures on land and water. * * *

"It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is that right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent—a relation in which it has been brought in consequence of its ownership. * * * *

"War existing, the United States were invested with belligerent rights in addition to the sovereign powers previously held. Congress had then full power to provide for the seizure and confiscation of any property which the enemy or adherents of the enemy could use for the purpose of maintaining the war against the government. It is true the war was not between two independent nations. But because a civil war, the government was not shorn of any of those rights that belong to belligerency.

"It is ever a presumption that inhabitants of an enemy's territory are enemies, even though they are not participants in the war, though they are subjects of neutral states, or even subjects or citizens of the government prosecuting the war against the state within which they reside."¹

¹ *Miller v. United States*, 11 Wall. 308, 313.

Again, the Supreme Court said of the same statute¹ that it "was designed to introduce the principle of confiscating enemy property seized on land, like that seized on water. Applying the confiscation, however, to the property of a limited class of enemies instead of to all enemies, it was conceived that the proceeding should be, in its essential features, analogous to those which the courts of admiralty were accustomed to use in property captured at sea."²

¹ Act to Suppress Insurrection, etc.,
12 Stat. L. 589.

² *Tyler v. Defrees*, 11 Wall. 331.

CHAPTER XXXII.

PRIZE.

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§ 285. **The Hostile Status of an Owner Imputed to his Property.** It is hostile ownership only which gives the enemy character to property, as has been shown.

Such ownership is predicated, in all cases where property is under the control of an enemy, without regard to the nice distinctions of title known to municipal law. Such ownership is presumed in all cases in which the person in control uses property for hostile purposes.

Conversely, the use of property for hostile purposes, such as the breaking of a blockade, impresses the hostile character upon the owner though he be nominally a neutral, and renders such property confiscable by reason of its ownership.

The hostility of property always rests upon the legal fiction, that it is what its owner is. This fiction attaches to all enemy property, whether confiscable after capture at sea, or after seizure

upon land; whether under the ordinary operations of prize law, or the extraordinary extension of war usage by statute.

The *jus in re* is always found in the enemy ownership. The right to the thing never vests in the capturing or seizing belligerent by reason of any act done in, with or by the thing, except on the assumption that such act imparts the hostile character to the owner, which gives the hostile character to the thing.

The enemy owner, who acknowledges no allegiance to the capturer, is not an offender, nor is his property an offending thing: therefore, the question of "prize or no prize" is not an inquiry into the guilt or innocence of the *res*, but involves only the *hostile* or *friendly* character of it. Though the term "innocent" is sometimes used by writers on public law as antithetical with *hostile*, yet the term *friendly* is far less likely to mislead.

§ 286. **The Domicile of the Owner Generally Indicates the Status of his Property.** Domicile fixes the national character of the owner, as a general proposition. A merchant's place of permanent residence and business is his domicile in contemplation of public law, and establishes his national *status* as a friend or enemy, whatever may be really the country to which his personal allegiance is due.¹ This is the presumption of public law.² And such presumption cannot be rebutted by proof of intent to return to a former country to which he professes allegiance, though it may be by the proof of conclusive facts.³ Caught in the enemy's country upon the sudden breaking out of war, he may remain there long enough to gather up his goods and take them out without acquiring the enemy character or imparting it to his effects; but if, while apparently preparing to leave, he should engage in new enterprises or specu-

¹ *Wilson v. Marryatt*, 8 Term, 31; *The Venus*, 8 Cr. 288; *Bentzon v. Bogle*, 9 Cr. 191; *The Anne Greene*, 1 Gal. 284; *The Dos Hermanos*, 2 Wheat. 76; *The Nereide*, 9 Cr. 388; *The Diana*, 5 Rob. 60; *The Harmony*, 2 Rob. 322; *McConnell v. Hector*, 3

Bos. & Pull. 114.

² *The Bernon*, 1 Rob. 103; *Elbers v. Ins. Co.*, 16 Johns. 128.

³ *The Ann*, 1 Dod. 221; *The Venus*, 8 Cr. 279; *La Virginie*, 5 Rob. 98; *The Joseph*, 1 Gal. 545; *The St. Lawrence*, 1 Gal. 467.

lations, his hostile *status* would be thus established, and the character would be impressed upon his property.¹

Both Vattel and Azuni contend that while a merchant is honestly preparing to get out of an enemy's country at the beginning of a war, his ships and cargoes on the ocean should be considered as retaining their neutral character;² but the judicial decisions seem to the contrary.³ No doubt the humane and just rule of the civilians would and should prevail, in a case clearly made out, showing that no enemy character had been imparted to such ship and cargo by the owner; but courts of nations, from the very nature of their situation in time of war, have to guard against all deceptions and simulations with zealous care, and must necessarily proceed upon general principles which are not always nicely discriminating. This subject was elaborately discussed by the Supreme Court, and by Chief Justice MARSHALL and Judge LIVINGSTON dissenting, in *The Venus*, above cited. If detained by restraint, however, the subject remaining in the enemy country would not acquire hostile character nor impart it to his property.⁴ And the rule ought to embrace the neutral; but it can hardly be said to have been so settled by the prize courts.⁵

§ 287. **Exception of Ministers and Consuls.** While ministers, representing the sovereignty of their respective countries, do not have their national character changed, in contemplation of public law, by the springing up of war in the countries to which they are accredited; and while this principle applies also to consuls in their official capacity, yet no sooner does a consul or minister engage in trade on his personal account, after the inauguration of war by or against the country to which he has been sent, than he becomes personally clothed with the enemy character so as to impart hostility to his goods and render them confiscable. His property in such case is liable to capture on the high seas by the opposite belligerent.⁶ On the other hand,

¹ The *Adriany*, 1 Rob. 315; The *Dree Gebroeders*, 4 Rob. 233.

² Vattel, liv. 3, c. 4, § 63; Azuni, part ii., c. 4, § 17.

³ The *Vigilantia*, 1 Rob. 14, and cases therein cited.

⁴ The *Ocean*, 5 Rob. 91.

⁵ The *San Jose Indiano*, 2 Gal. 293; The *Freundschaft*, 3 Wheat, 52; The *Nayade*, 4 Rob. 251.

⁶ The *Indian Chief*, 3 Rob. 27; The *Josephine*, 4 Rob. 25; The *Dree*

the consul for a belligerent government, officially located in a neutral country, may trade with all the immunity of a neutral.¹

§ 288. **Change of Character.** Restitution will be accorded where change of residence, so as to presumptively change character from hostile to friendly, is proven by the claimant to have occurred before capture or seizure—even if the *res* is a ship which was *in transitu* at the time of such change of domicile; and this is the more to be remarked, since it is exceptional to the general doctrine governing ships *en voyage*.² Not so, however, when goods are purchased in the hostile country and brought off with him, even though on his return to the country to which he owes his allegiance he is deemed an enemy, and his goods are tainted with hostility.³ Nor when he comes home with intent to go back.⁴

Should the subject of a belligerent country emigrate to another, his goods would be confiscated by either belligerent, since either would properly presume both him and them hostile in relation to itself. This is the doctrine here,⁵ but not everywhere. The civilians seem to prefer the contrary; among them such high authorities as Grotius, Vattel and Puffendorff.

§ 289. **Effect of Cession of Territory upon National Character.** Enemy character as to persons is determined by the country they inhabit—whether it be neutral or hostile. Cession of territory, when fully completed with the establishment of government over the people by the acquiring power, takes with it the people themselves, so far as their nationality is concerned. There must be full completion of the change of government, however; for it was held that though by the treaty of

Gebroeders, 4 Rob. 232; 1 Kent's Com. 44; 1 Wheat. Int. Law, 282; Albrecht v. Sussinan, 2 Ves. & Beames, 323; Arnold v. United Ins. Co., 1 Johns. Cases, 363.

¹ The Sarah Christiana, 1 Rob. 239.

² The Indian Chief, 3 Rob. 31.

³ The St. Lawrence, 1 Gal. 471 and 9 Cr. 120; The Hoop, 1 Rob. 214; The Mary, 9 Cr. 147.

⁴ The Jonge Ruiter, 1 Acton's Appeal Cases, 116; The Nereide, 9 Cr. 414; The Friendschaft, 3 Wheat. 52.

⁵ The Dos Hermanos, 2 Wheat. 78; Duguet v. Rhinelander, 1 Johns. Cases, 360; Jackson v. N. Y. Ins. Co., 2 Johns. Cases, 191. But see 2 Johns. Cases, 276, and 1 Cairnes' Cases in Error, xxv.

St. Idelfonso, Louisiana had been ceded to France, long before the sailing of *The Fama*, that vessel escaped condemnation on the ground that she was still a Spanish vessel because there had been no formal delivery of the province to the French authorities.¹ Temporary military occupation of a territory does not change the national character of either people or property. But where there is a voluntary surrender, it has been held immediately to change the character of both.² Lord ELLENBOROUGH knew of no instance in which a country had been held to be conquered while maintaining its civil government *proprio jure*.³ And his view has been virtually taken by other authorities.⁴ In the case of *Bentzon v. Boyle*, however, our Supreme Court must not be understood to say that a conquered country, prior to the fixing of its final *status* by treaty, is not to be considered a part of the conquerer's country for belligerent and even commercial purposes, from the moment of conquest. Nor is the doctrine different in the court of the King's Bench as laid down by Lord ELLENBOROUGH in *Hagedorn v. Bell*, above cited.

§ 290. **Change from Friendly to Hostile Character.** The converse of the rule that a ship retains her hostile character to the end of the voyage, if she set out with it, notwithstanding a change from hostile to friendly in the character of the owner, is not recognized by international law; but, on the contrary, should the owner change from friendly to hostile, the ship's character would be reversed immediately, even while *in transitu*, and she would become confiscable. The test is, in the latter case, What is the character of the owner, friendly or hostile? The answer determines the *status* of the ship. No change of the owner's character, between seizure and adjudication, can affect that of the thing proceeded against. These principles have been most learnedly elucidated by Lord STOWELL;⁵ and Lord ELLENBOROUGH, in a case not prize, has held a similar opinion.⁶

¹ *The Fama*, 5 Rob. 106.

² *The Boletta*, 1 Ed. Ad. R. 171.

³ *Hagedorn v. Bell*, 1 M. & S. 450.

⁴ *Bentzon v. Boyle*, 9 Cr. 191; *Bromley v. Hesseltine*, 1 Camp. 75.

⁵ *The Boedes Lust*, 5 Rob. 233; *The Diana*, Id. 60.

⁶ *Harman v. Kingston*, 3 Camp. 152.

§ 291. **Status Inferred from Traffic.** The owner's character as friendly or hostile is often inferred from his traffic, irrespective of his domicile. We instance the following:

1. If he is engaged in commerce under license from the enemy.¹

2. If, though he has personally withdrawn from the enemy's country, he leave his effects there in charge of his business firm domiciliated there: in such case, so far as ownership of his interest there remaining is concerned, he is an enemy, and he imparts the enemy character to that interest.²

3. If, having never resided in the enemy country, a neutral is a member of an enemy firm there doing business, he is deemed an enemy too, and his interests are confiscable with those of his partners.³ But his other property would be treated as friendly and not liable as prize.⁴

4. A merchant making a venture within the enemy's country, is an enemy as the owner of the goods in hostile traffic, though he may not be such in relation to all his other property.⁵

5. A merchant who is a member of an enemy firm, but who left permanently the enemy country, in which his firm is domiciliated, at the beginning of the war, should be allowed standing in court to claim his interest in the captured goods of the firm; and, in such case, upon proof, there should be restitution of his share.⁶

§ 292. **Confiscable Goods.** The general rule is that belligerents have a right to make prize of each other's property found upon the high seas; and to this rule there are but few exceptions.⁷ Goods shipped from a neutral country to that of a belligerent, or *vice versa*, may or may not possess the enemy character. That depends upon their ownership at the time of the shipment—whether in the consignor or consignee. If they are to belong to an enemy upon their arrival, they have the

¹ 1 Kent's Com. 77.

² The Portland, 3 Rob. 41; The Nancy, 1 Rob. 14.

³ The Friendschaft, 4 Wheat. 107; The San Jose Indiano, 2 Gal. 268.

⁴ The Herman, 4 Rob. 230; The Antonia Joanna, 1 Wheat. 159.

⁵ The Jonge Klassina, 5 Rob. 302; *vide* Elbers v. U. Ins. Co., 16 Johns. 133.

⁶ The Vigilantia, 1 Rob. 14, and cases therein cited.

⁷ Wheaton on Capt., Appendix, p. 317.

enemy character during the transit.¹ This is true, if the shipment be made in time of war, though the contract may have been entered into, in time of peace. But, on the other hand, if goods are shipped from a belligerent country to a neutral, by an enemy consignor to a neutral consignee, by virtue of a previous sale, the title vests in the consignee immediately upon their delivery to the master of the ship conveying them, and they are neutral goods, exempt from capture, if not contraband of war or otherwise impressed with the enemy character. If, however, the contract was an aleatory one, and any right is left in the enemy consignor to control the goods in any way, the title would be considered still in him, in view of public law, and the goods would be confiscable.² As Sir W. SCOTT said, in the *Noydt Gedacht*, a sale made during a war by an enemy to a neutral, must be absolute.

§ 293. **Ships in Transitu.** While a ship and cargo are *in transitu*, no contract between an enemy and a neutral, during war, can change the national character.³ The rule holds good, if the contract be made in time of peace but with apprehension of war, since the presumption is that the transfer is with fraudulent design. This rule, however, yields to the principle of commercial law, where the neutral consignor has a right of stoppage *in transitu*; and, if he exercises this right by countermanding the bill of lading and regaining possession of the goods before the termination of the voyage, they are not liable to capture by the belligerent opposed to the intended consignee. If, however, an enemy consignor to a neutral should exercise his commercial right of regaining title by stoppage *in transitu*, the goods would acquire the enemy character by the change, and would be retroactively confiscable from the commencement of the trip. This state of things seldom occurs, since, under the law merchant, the only circumstance that authorizes *stoppage*

¹ The *Atlas*, 3 Rob. 299; The *Sally*, Id. 300; The *Anna Catharina*, 4 Rob. 107; The *Venus*, 8 Cr. 275. *Contra*, *Ludlow v. Brown*, 1 Johns. 1; *De Wolf v. N. Y. Ins. Co.*, 20 Johns. 214.

² The *Noydt Gedacht*, 2 Rob. 137; The *Josephine*, 4 Rob. 25; The *Fran-*

cis, 1 Gal. 450; The *Carolina*, 1 Rob. 305; The *Aurora*, 4 Rob. 218; The *Francis*, 8 Cr. 354; The *Venus*, Id. 275; The *Merrimack*, Id. 317.

³ The *Vrow Margaretha*, 1 Rob. 336; The *Carl Walter*, 4 Rob. 207; The *Jan Frederick*, 5 Rob. 128.

in transitu at all, is the consignee's insolvency. In the case of the *Constantia*, Sir Wm. Scott held that though a consignor, by reason of unfounded suspicion of the insolvency of the consignee, attempted to exercise his supposed right of regaining the cargo, yet, as the latter was really solvent, the property did not change hands, and was free from liability because it really belonged to the neutral consignee from the incipency of the voyage.¹

Where there is no contract before shipment, but an enemy consigns goods to a neutral with terms of sale stated, if the latter has accepted the proposition and thus completed the contract, before the capture of the goods, there can be no condemnation. Change of title during the voyage, in such a case, changes the national character of the goods.²

With these rare exceptions, the general rule is: Once hostile, always hostile to the end of the voyage. The owner of property may throw off the general enemy character without being able to remove the hostile impression which his property has received.³ This is illustrated by the case of a Dutch ship, owned by merchants of the Cape of Good Hope, which was cleared from Batavia for Holland when they were Dutch subjects, but which was captured and condemned by the British, after the merchants had become British subjects and sworn allegiance to their new sovereign, in consequence of the capture of the Cape by the British after the sailing of the ship. The court condemned the ship as enemy property, on the ground that her character could not be changed during the voyage though that of her owners had changed⁴ as to all things but the ship.

§ 294. **Sale by an Enemy to a Neutral.** The sale of a ship by an enemy to a neutral is null by public law, if there be a stipulation that the contract is to be revoked at the close of hostilities; also, if the vendor retain a lien upon the vessel for the price; and also, when the enemy vendor retains control of the vessel.⁵

¹ The *Constantia*, 6 Rob. 324.

107; The *Herstelder*, Id. 113.

² *Cousine Marianne*, 1 Ed. Ad. Rep. 346.

⁴ Id.

³ The *Danckebaar Africaan*, 1 Rob.

⁵ The *Noydt Gedacht*, 2 Rob. 137; The *Sechs Geschwistern*, 4 Rob. 100:

If the purchase by a neutral be absolute and unconditional, the price paid and the control of the vendor fully ended, still, if the vessel trades with the enemy, she becomes confiscable on the ground that the character of the owner becomes hostile by such traffic.¹

Sale of a war-ship to a neutral in a neutral port, because of inability to come out without incurring capture, is void; and sale of merchant vessels, under such circumstances, has been considered of questionable validity.²

§ 295. **Change of Flag.** A ship previously neutral, becomes immediately hostile the moment she hoists the enemy's flag, or sails under his pass.³ And the general rule is that the goods, under such flag, follow the fate of the vessel.⁴

The cargo, however, does not necessarily change character with the ship when she dons the enemy's flag. Friendly goods, laden in time of peace, without contemplation of war, do not become hostile by reason of the breaking out of war, though the ship does, if her owner thus becomes a belligerent by his nationality: provided, however, the neutral character of the owner of the goods has not been changed. Of course the goods, under such a flag, would be confiscable, if laden in view of approaching hostilities, and with knowledge that the enemy's flag was to be raised over them.⁵

Simulated papers are evidence of the hostile character of a cargo, nominally neutral, though it be laden before the declaration of hostilities, in case the vessel bearing it should become hostile by such declaration.

§ 296. **Inferences From the Nature of Commerce.** The peculiar character of the commerce may impress goods with the enemy character; for instance, if a nation has a trade confined

The *Vigilantia*, 1 Rob. 1; The *Emden*, Id. 16; The *Jemmy*, 4 Rob. 31.

¹ The *Endraught*, 1 Rob. 19.

² The *Minerva*, 6 Rob. 399.

³ The *Vigilantia*, 1 Rob. 13; The *Vrow Elizabeth*, 5 Rob. 5; *Sleight v. Rhinelander*, 2 Johns. 531; *Barker v. Phoenix Ins. Co.*, 8 Johns. 321; The

Ann, 1 Dod. 221; The *Success*, 1 Dod. 132.

⁴ The *San Jose Indiano*, 2 Gal. 285; The *Princessa*, 2 Rob. 49; The *Susa*, Id. 256; The *Anna Catharina*, 4 Rob. 109; The *Rendsborg*, 4 Rob. 121.

⁵ The *Ann Green*, 1 Gall. 286; The *Vreede Scholtys*, 5 Rob. 5.

to its own subjects exclusively, in time of peace, yet, upon the breaking out of a war such nation becomes a belligerent, a neutral nation, previously excluded from such commerce, cannot now engage in it without rendering the goods employed in such trade confiscable by such belligerent. If the commerce is hostile, the goods are so.

Goods produced in an enemy's country partake of its character, though owned by a neutral, because they are under the enemy's control. In such case the neutral is, as to the produce, deemed an enemy. Such produce has been held confiscable, though shipped before the commencement of war, if seized *in transitu* after the commencement.¹

§ 297. **Use of a Neutral Vessel by an Enemy.** If the nominally neutral owner of a vessel allows a belligerent to use her, both she and him are deemed of hostile character, in case she be captured while in such use. He cannot be heard to defend her; not even upon the plea of duress.² Conveyance of military belligerents, even without knowledge of their character, by the master of a vessel, has been held to render her lawful prize, though she and her owner had been previously neutral.³ The rule does not extend to the conveyance of enemies not military, as mere passengers from neutral port to neutral port, without knowledge of their character and without design to aid the enemy.⁴

The conveyance of public dispatches of a belligerent, by the master of a nominally neutral ship, with knowledge on his part, renders both ship and cargo confiscable;⁵ but a passenger on board might be the bearer of such official communications without involving such consequences.⁶ The guilty knowledge of the master, in such case, would not involve the cargo if its owners knew nothing of the conveyance of such dispatches,

¹ The *Phoenix*, 5 Rob. 20; The *Vrow Anna Catharina*, 5 Rob. 167; *Bentzon v. Boyle*, 9 Cr. 191.

² The *Carolina*, 4 Rob. 256.

³ The *Orozembo*, 6 Rob. 430; The *Friendship*, Id. 420.

⁴ The circumstances of the capture of *Slidell* and *Mason*, and the corre-

spondence thereon, may be referred to as illustration, though Captain *Wilkes* did not capture the neutral ship with them.

⁵ The *Atlanta*, 6 Rob. 440; The *Caroline*, Id. 461.

⁶ The *Rapid*, 1 Ed. 228.

and if the master does not represent the owner's relation to the cargo any further than in the capacity of a common carrier.¹

A vessel, however, may knowingly bear the official dispatches of a minister resident in a neutral country and stationed there before the war, though his government has become belligerent, without incurring confiscability;² and it has been even said that she may, with impunity, bear dispatches to him from such government during belligerency.³

§ 298. **Do Free Ships Make Free Goods?** "Free ships make free goods" has so often been said in treaties, that it has almost grown into a principle of international law; but, in the absence of treaties, it cannot be said universally to prevail. Goods of an enemy on a neutral ship are confiscable as prize, in the absence of treaty stipulations to the contrary. The ship is subject to search, but her carriage of such goods would not render her capturable, nor even subject her to a loss of freight,⁴ unless there has been some unfair dealing or suppression of papers by the master.⁵

The character of the cargo is not determined by the flag: the cargo may be neutral by reason of its ownership, though captured on an enemy ship under an enemy flag.⁶ But such a cargo so captured is under the presumption of hostility and will be condemned with the ship unless the distinction between the character of the two is made to appear by the papers or otherwise.⁷

§ 299. **Contraband Goods.** On the other hand, a hostile cargo, contraband of war, rendered the neutral ship confiscable by ancient law; but now loss of freight seems to be the only consequence to a neutral carrier, unless there are other attendant causes for her condemnation.⁸ Even freight has been allowed such carrier, where the contraband bore a very small

¹ The Carolina, 6 Rob. 463, and cases there cited.

² Id.

³ The Madison, 1 Ed. 224; The Commercen, 1 Wheat. 382.

⁴ The Atlas, 3 Rob. 304.

⁵ The Emanuel, 1 Rob. 296; The Rising Sun, 2 Rob. 104.

⁶ The Fortuna, 4 Rob. 278; The Diana, 5 Rob. 71.

⁷ The London Packet, 1 Mason, 14; The Flying Fish, 2 Gal. 374.

⁸ The Ringende Jacob, 1 Rob. 89; The Mercurius, Id. 288; The Jonge Tobias, Id. 329; The Franklin, 3 Rob. 217.

proportion to the friendly cargo;¹ and the liberality of an English prize court has gone so far as to restore goods as friendly, though belonging to the owner of condemned contraband goods in the same cargo.² Indeed, Lord STOWELL let off a ship owned by the proprietor of the contraband goods she was conveying,³ but the case went off upon circumstances peculiar to itself, and the decision is not in line with any general rule.

Where transportation of contraband by a neutral is violative of treaty, the freight is lost, and the ship is confiscable.⁴ Pleas of ignorance, threats or violence will not avail the neutral carrier.⁵ All goods owned by the owner of contraband goods are deemed to be affected by the contagion of hostility,⁶ though we have mentioned that the rule has sometimes been relaxed.

A ship, bearing contraband to a hostile port, must be caught *in delicto*;⁷ if captured on the return voyage, it has been held that neither the ship nor the proceeds of the contraband goods would be confiscable.⁸ But this case can hardly be laid down as settled doctrine in England;⁹ while in the United States the opposite view seems to be preferred;¹⁰ and it has even been extended so far as to embrace a neutral carrier of contraband after she had reached port on the return voyage.¹¹ It cannot fairly be said that the English and American authorities are pitted against each other on all points touching this question, for we have some of the former holding confiscability on the return voyage,¹² and some of the latter to the contrary.¹³

Change of destination *en voyage* from a hostile to a friendly port; or change of the destined port from hostile to friendly, would relieve contraband goods of liability to capture.¹⁴

¹ The Neptunus, 3 Rob. 108.

² The Charlotte, 5 Rob. 280.

³ The Jonge Margaretha, 1 Rob. 189.

⁴ The Neutralitet, 3 Rob. 295; The Enrom, 2 Rob. 6.

⁵ The Carolina, 4 Rob. 260; The Oster Risoer, 4 Rob. 199; The Richmond, 5 Rob. 325.

⁶ The Staadt Embden, 1 Rob. 26; The Jonge Tobias, Id. 330.

⁷ The Imina, 3 Rob. 168.

⁸ Id.

⁹ The Nancy, 3 Rob. 122; The Rosalia and Betty, 2 Rob. 318; The Baltic, 1 Acton, 25; The Margarette, Id. 333.

¹⁰ Wheaton on Captures, 183; The Joseph, 8 Cr. 451.

¹¹ The Caledonia, 4 Wheat. 100.

¹² The Christiansberg, 6 Rob. 381; Parkman v. Allen, 1 Stair, 29; The Randers Bye, note in 6 Rob. 382.

¹³ Kents' Com. 151; Carrington v. Merchants' Ins. Co., 8 Peters, 521.

¹⁴ The Trende Sostre, 6 Rob. 390;

It is the destination of a ship with contraband goods on board which makes the owner hostile in the eyes of public law, and his property confiscable: therefore, if captured while going from one enemy port to another, the liability is incurred.¹

§ 300. **What are Contraband Goods?** All implements and munitions of war; all articles used or destined for hostile purposes; all money, naval or army stores and provisions for use in war.

It would be a long list should an inventory be made of all contraband articles; but it may serve to name ships of war, cannon, muskets, firearms of every description, gunpowder, salt-petre, gun carriages, ammunition wagons, and war-horses; and also, pitch, tar, hemp, sail-cloth, cordage, rigging, anchors, masts, rudders, spars, sails, etc., if destined for enemy use.

There has not been perfect agreement among the civilians concerning what is always necessarily contraband, but the foregoing specifications may be fairly deduced from their discussions as being clearly within the class.²

The destined use for war purposes may be inferred from the destination of the vessel bearing the goods.³

Though a vessel, with provisions or other contraband articles on board—contraband if destined for enemy use—may be ostensibly bound for a friendly port; yet, if that port be near one of the enemy, and the goods easily transhipable to the enemy, and circumstances warrant the conviction that they are destined for enemy use, they are confiscable as contraband of war. This principle, we think, is clearly deducible from, if not plainly asserted in, several decisions.⁴

The *Lisette*, Id. 387; The *Imina*, 3 Rob 167.

¹ The *Edward*, 4 Rob. 70; The *Commercen*, 1 Wheat. 382.

² Bynkershoek, (2 J. P.) Lib. i., c. 10; Pothier's *Traite de Proprieté*, n. 104; 2 Valin *Com. Lib.* 3, tit. 9, art. 11, p. 264; Vattel, Lib. 3, c. 7, § 112; Heineccius *de Navibus*, c. 1, § 14; Grotius *de Jure*, Lib. 3, c. 1 § 5; Loccenius *de Jure Marit.* Lib. 1, Cap., 4, § 9.

³ The *Staat Embden*, 1 Rob. 26; The *Sarah Christina*, Id. 241; The *Maria*, Id. 372; The *Apollo*, 4 Rob. 158; The *Christina Maria*, 4 Rob. 166; The *Twee Juffromen*, Id. 244; The *Evart*, Id. 354; The *Commercen*, 1 Wheat. 382.

⁴ *Maisonnaire v. Keating*, 2 Gal. 335; The *Commercen*, 1 Wheat. 382; The *Jonge Margaretha*, 1 Rob. 196; The *Haabet*, 2 Rob. 182; The *Edward*, 4 Rob. 68; The *Zelden Rust*,

§ 301. **Breach of Blockade.** How, by breach of blockade, is hostility imputed to property owners, and, consequently to the property used in such breach?

Blockade must be established by sovereign authority¹ and must be actual and effective,² and must suspend commerce,³ in order to be obligatory upon neutrals. It would cease to be worthy of regard, should it be actually abandoned by the government instituting it, though no formal revocation had been proclaimed.⁴ But a neutral has no right to take advantage of the temporary suspension of a duly proclaimed blockade.⁵ Under such circumstances, however, an attempt to enter the port in ignorance of the fact that the blockade had not been revoked, has been held not sufficient to render the vessel liable,⁶ though knowledge is generally presumed.⁷

Broken by the opposite belligerent, the blockade no longer offers a legal barrier to the entry of neutral ships, though its interruption by such enemy be but of temporary duration. While thus suspended, neutral vessels cannot be said to make a breach of it by entering in disregard of the proclamation.⁸ Nor is it held a breach of a naval blockade, if, in the absence of military investment of the land, articles be conveyed by a circumlocutory route to the enemy; for, however confiscable such articles might be on other grounds, they could not be said to have violated the blockade;⁹ but it was held, in the case of

6 Rob. 93; *The Ranger*, Id. 126; 11 Wheat. Int. Law, 195 et seq.

¹ *The Rolla*, 6 Rob. 366.

² *The Henrick and Maria*, 1 Rob. 146.

³ *The Vrouw Judith*, 1 Rob. 150.

⁴ *The Neptunus Kuyp*, 1 Rob. 170; *The Betsey*, Id. 93; *The Betsey*, Id. 332; *The Vrouw Johanna*, 2 Rob. 109; *The Christiana Margaretha*, 6 Rob. 62; *The Spes and the Irene*, 5 Rob. 76; *The Shepherdess*, Id. 262.

⁵ *The Columbia*, 1 Rob. 154; *The Triheten*, 6 Rob. 65; *The Hoffnung*, Id. 116; *The Eagle*, 1 Acton, 55; *The Nancy*, Id. 57.

⁶ *Radcliff v. U. Ins. Co.*, 7 Johns. 54.

⁷ *The Jonge Petronella*, 2 Rob. 131; *The Neptunus*, 2 Rob. 110; *The Calypso*, 2 Rob. 298; *The Frederick Malke*, 1 Rob. 86; *The Judith*, Id. 150; *The Hare*, 1 Acton, 261; *The Hurtige*, Hane, 3 Rob. 328; *The Mercurius*, 1 Rob. 80; *The Henrick and Maria*, Id. 146; *The Vrouw Judith*, Id. 150; *The Apollo*, 5 Rob. 286; *The Columbia*, 1 Rob. 156; *The Tutela*, 6 Rob. 177.

⁸ *The Triheten*, 6 Rob. 65; *The Hoffnung*, Id. 112.

⁹ *The Sert*, 4 Rob. 65; *The Ocean*, 3 Rob. 297; *The Jonge Pieter*, 4 Rob. 79.

The Marcia,¹ that blockade was violated by the conveyance of goods by lighters through the blockaded mouth of a river, for exportation.

Cotton, picked up at sea, under such circumstances as to render it probable that it had been thrown from a blockade-runner, was condemned as prize.²

§ 302. **A Blockade Breaker Confiscable from the Beginning of the Voyage.** A ship intending to violate blockade, by either ingress or egress, is confiscable from the beginning of the voyage.³ She may enter when licensed,⁴ though she has run somewhat out of the regular course; and though unavoidable necessity may justify entrance without license,⁵ yet these circumstances furnish no exceptions to the rule that intended violations of blockade render the ship and cargo hostile, since entrance by license or necessity would not be a violation. It has been held that stress of weather, or want of ship's victuals, is not such necessity as to justify entrance.⁶ Nor the necessity of finding a pilot;⁷ but where it was shown that the weather and shortness of provisions were such as to render her unable to enter any other port, the ship's entrance into a blockaded one was excusable.⁸

§ 303. **Liabie to Capture on Return Voyage.** A successful blockade runner is liable to capture on her return voyage.⁹ She is purged of her hostility, however, (if a neutral,) upon the completion of the return voyage. If a ship be purchased by a neutral, and *delivered* before the establishment of blockade, the friendly purchaser does not thereby incur the enemy

¹ *The Maria*, 6 Rob. 201. *Vide*, *The Charlotte Sophia*, 6 Rob. 204.

² 78 Bales of Cotton, 1 Low. 11.

³ *The Columbia*, 1 Rob. 154; *The Betsey*, Id. 332; *The Vrouw Johanna*, 2 Rob. 109; *The Neptunus*, Id. 110; *The Spes and the Irene*, 5 Rob. 76; *The Shepherdess*, Id. 262; *The James Cook*, Ed. Ad. R. 261; *Vos & Graves v. U. Ins. Co.*, 1 Cairnes, vii.; 2 Johns. Cases, 180, 469; *Yeaton v. Fry*, 5 Cr. 335; *Fitzsimmons v. Newport Ins. Co.*, 4 Cr. 185; *The Nereide*, 9 Cr.

440; *The Posten*, 1 Rob. 336; *The Little William*, 1 Acton, 141; *The Neutralitet*, 6 Rob. 30; *The Charlotte Christine*, Id. 101; *The Gute Erwartung*, Id. 182.

⁴ *The Juno*, 2 Rob. 116.

⁵ *The Comet*, Ed. 32; *The Hurtige Hane*, 2 Rob. 124.

⁶ *The Fortuna*, 5 Rob. 27.

⁷ *The Carlotta*, Ed. 252.

⁸ *The Elizabeth*, Ed. 198.

⁹ *The Frederick Molke*, 1 Rob. 86; *The Christiansberg*, 6 Rob. 381.

character as to the ship. And it has been held that if the purchase be by a neutral from a neutral, the ship may be brought out, in ballast, from a blockaded port.¹ And whether such a purchased ship may bring out cargo depends entirely upon the question whether the cargo had been purchased before the blockade—at least, before knowledge of it—by a friendly vendee, in good faith: if the answer to the query is negative, both ship and cargo would be confiscable.² But cargoes can, in no case of this kind, be taken to the hostile country.³ If only a part of the cargo is knowingly put on board with the view of violating blockade, all the cargo becomes infected with hostility as well as the vessel.⁴ A vessel within a foreign port, at a time when war is imminent between her country and that of the port, may, to protect herself from seizure and condemnation there, even buy a cargo there and bring it out.⁵

§ 304. **Goods on such Vessel Confiscable.** Goods on board of a blockade runner are always condemned with the ship when owned by the same owner; and whether so owned or not, except in rare cases wherein it clearly appears that such condemnation would work evident injustice; for instance, when the papers on board fully screen them from all imputation of the hostile character, and so separate them from the condition of the ship as to warrant their restoration.⁶ There can be no condemnation, however, of either ship or cargo, for mere intent to break blockade, if the blockade cease to exist before the attempt is consummated, or if the ship give up the premeditated violation before capture.⁷

§ 305. **False Papers, Resistance to Search, Etc.** False papers found on board of a captured vessel are fatal proof against her. So also the concealment or destruction of necessary papers.⁸

¹ The Gen. Hamilton, 6 Rob. 61; The Vigilantia, Id. 122; The Potsdam, 4 Rob. 89.

² The Vrouw Judith, 1 Rob. 150; The Neptunus, Id. 170.

³ The Byfield, Ed. Ad. Rep. 188.

⁴ The Calypso, 2 Rob. 298.

⁵ The Drie Vrienden, 1 Dod. 269.

⁶ The Exchange, Ed. Ad. Rep. 43;

The Mercurius, 1 Rob. 80; The Manchester, 2 Acton, 60; The Adelaide, 3 Rob. 281; The Neptunus, 3 Rob. 173.

⁷ The Lisette, 6 Rob. 387; The Neptunus, 2 Rob. 114; The James Cook, Ed. Ad. Rep. 263.

⁸ The Two Brothers, 1 Rob. 131; The Rising Sun, 2 Rob. 104; The

Resistance to search, in time of war, is ground for confiscation, involving both ship and cargo.¹ But, in time of peace, right of search has been denied.² But it may exist, of course, under treaty.³ And the right is said to be confined to merchant ships,⁴ though probably the reason why it is not extended to ships of war is one of might rather than of right.

Ships under cartel are exempt from capture, since, otherwise, prisoners could not be conveyed by sea from one enemy's country to another, for exchange. And the exemption continues with the cartel on the return voyage.⁵ Should a cartel ship violate her trust by engaging in trade, she would at once become confiscable.⁶

Polly, Id. 362; *The Pizarro*, 2 Wheat. 241; *The Hunter*, 1 Dod. 480; *The Eliza and Katy*, 6 Rob. 192; *The Jufrow Anna*, 1 Rob. 125; *The Vrow Hermina*, 1 Rob. 163; *The Rosalie and Betty*, 2 Rob. 343; *The Nancy*, 3 Rob. 122; *The Jonge Tobias*, 1 Rob. 329; *The Convenientia*, 4 Rob. 201; *The Johanna Tholen*, 6 Rob. 72; *The Mars*, 6 Rob. 79; *The Phoenix*, 3 Rob. 186; *The Graaff Bernstorff*, 3 Rob. 109; *The Zulema*, 1 Act. 14; *The Ann Green*, 1 Gal. 275; *The Sally*, Id. 401; *The Alexander*, Id. 536; *The Betsey*, 2 Gal. 384; *The Fortuna*, 3 Wheat. 245; *The St. Nicholas*, 1 Wheat. 417; *Blaze v. N. Y. Ins. Co.*, 1 Cairnes, 565; *Phoenix Ins. Co.*

v. Pratt, 2 Binney, 308.

¹ *The Maria*, 1 Rob. 360; *The Dispatch*, 3 Rob. 279; *The Anna Maria*, 2 Wheat. 332; *The Nereide*, 9 Cr. 388; *The Pennsylvania*, 1 Act. 33; *The Topaz*, 2 Act. 20; *The Franklin*, Id. 106.

² *The Marianna Flora*, 11 Wheat. 43; 1 Kent, 153, *note*.

³ *Le Louis*, 2 Dod. 248; *The Antelope*, 10 Wheat. 119.

⁴ *The Prins Frederick*, 2 Dod. 451; *The Exchange*, 7 Cr. 116; *L'Invincible*, 1 Wh. 238.

⁵ *The Daifjie*, 3 Rob. 139; *La Gloria*, 5 Rob. 192; *The Mary*, Id. 200.

⁶ *The Venus*, 4 Rob. 355; *The Carolina*, 6 Rob. 336.

CHAPTER XXXIII.

THE PRIZE LAWS.

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§ 306. **Legislative Limitations.** Preliminary to any commentary on the Prize Acts, let us briefly consider legislation in general concerning hostile property. Whether a statute upon the subject is in reference to captures on navigable waters, or to either captures or seizures upon land; whether it is in regard to enemy property deriving its character from contravention of non-intercourse laws, thus imputing hostile ownership; or to such property deriving its character from simple hostile ownership; whether it be a prize act or a confiscation act, it must necessarily rest upon international law, and the law of nations as interpolated into our Federal Constitution. The right to seize or capture enemy property cannot be given by any statute. The methods of seizure or capture must be consonant with international usages so far as they have crystallized into public law; and, indeed, in all cases, unless a change of method, made within the proper margin allowable to each nation, be expressed by the political power of the innovator, in some intelligible form, to the other nations of the earth. And what we have said of seizure and capture, in this respect, will apply equally well to all the succeeding proceedings to the period of final adjudication. Manifestly, however, there is not the like restriction upon methods of sale, for the reason that so soon as

condemnation has become final, it cannot concern other nations whether we sell our property in one way or another. So far as the interests of the great public of nations are concerned, we must proceed according to the law of nations in all things wherein that law governs: beyond that, we are free to provide by statute.

§ 307. **Statutes Directory.** It will readily be seen, from the above observations, that statutes concerning the condemnation of hostile property, can be nothing more than directory, regulative and restrictive. Such a statute need not have all the three qualities: it may not be restrictive. We have an example of a directory and regulative one in the prize act of 1864; of a directory, regulative and restrictive one, in the confiscation sections of the confiscation act of 1862. The legislative power, in furthering the prosecution of war, whether public or civil, need not direct the capture of naval prizes, (since that usage generally prevails among nations,) but it is always found necessary to enact regulations for governing the exercise of the right. That power should, however, direct the capture or seizure for confiscation purposes, of hostile private property found on land, if such is the sovereign will, since such confiscations are contrary to modern usage among nations. And if less than all hostile property found on land is meant to be condemned, the statute must be restrictive, so as to limit the seizures and confiscations to such property as the sovereign will has elected to take. In all cases, it is found necessary that the statute should be regulative of the proceedings.

§ 308. **Proceedings Necessarily In Rem.** Necessarily the proceedings against hostile property must be *in rem*, since it is never confiscable except for the one cause, enemy character. Whatever deeds may be done with it; however it may be caught *in delicto*, its liability to condemnation is the hostility of character impressed upon it by its enemy ownership. All minor causes are merged in this. Even a blockade-breaking ship is confiscable only for enemy ownership; for, though the proprietor may be nominally a neutral, he is in international law an enemy owner, because engaged in aiding and abetting the enemy. Never can we condemn a hostile thing as a guilty

thing since the laws of nations applicable to the former are not applicable to the latter, in several respects.

Why, since the right to condemn is always found in the hostility implied from ownership, must the proceedings always be *in rem*? Because we have no jurisdiction over a public enemy so as to sue him *in personam*. We cannot bring him into court except as a prisoner of war. And the theory of confiscating citizen enemies' property, in insurrectionary war, is that they, *ex necessitate*, must be treated as foreign enemies, if we would confiscate their property at all, since it is impossible, for the time being, to execute municipal laws against them as citizens. So they form no exception to the rule.

The object of the proceedings *in rem*, however, is not to bring an enemy into court as a claimant, but, so far as notice and monition to him are concerned, to give the alleged enemy the opportunity to disavow the enemy character and make his claim. Of course, no charge of hostile ownership is usually made against any enemy by name, yet such proprietorship being the sole cause of condemnation in all this class of cases, the charge is always implied both in the allegation of capture or seizure, and the necessary prayer for condemnation as enemy's property. Often it occurs that the owner shows, upon his appearance, that hostility has not been imparted to the thing seized, either by his being a professed enemy or an abettor by hostile use of the thing he claims. It is for the protection of friends and neutrals, and the preservation of international law inviolate, that any proceedings are necessary at all. All hostile property is proper booty of war so soon as the fact is judicially found that it is hostile property, after the sovereign has proclaimed his design to avail himself of all his rights, just as much as the guns captured in battle, which are so evidently hostile as to need no adjudication.

§ 309. **Position of Enemy Owners of the Res.** There is this peculiarity in all suits *in rem* for the confiscation of enemy property: the real owner cannot be allowed to claim it, if the necessary allegations of the libel be true. Although the notice, (when required as in the confiscation statutes,) is to "all persons," it can never override that settled principle of the *jus*

gentium, founded on the best reasons, that an enemy can have no standing in the courts of the opposite belligerent. He cannot be heard to claim, if the libel is properly drawn, and is true. But he may make an appearance as friend or neutral, to deny the necessary allegation of the libel concerning the enemy character of the *res*; he may appear and claim under such circumstances, by an agent or attorney, and deny that he is an enemy, that his property is enemy property, that it has been used by the enemy or captured from the enemy. And, if he succeed in proving such denial, there can be no condemnation of the alleged prize or seized property.

The above and other principles; rights of nations to take and confiscate, and rights of claimants to deny hostility, must be recognized in all courts of nations; and they are not created or conferred by statute.

§ 310. **Prize Legislation Not Creative of Rights.** With these preliminary remarks, the prize act, as it may be termed for convenience sake, may now be taken up, as it is found in the Revised Statutes from section 4613 to 4652 inclusive, constituting Title liv., and made up almost wholly from the act of June 30, 1864.¹

The act regulates capture, judicial proceedings, the taking of testimony, the adjudication, the sale, the distribution of proceeds, appeal, and several minor matters. It is, generally speaking, free from ambiguity, so that we shall not be driven to the congressional debates at the time of its passage, or to any legislative explanation, to help us to its meaning.

The provisions of the prize title of the Revised Statutes do not apply to all naval captures but to such as are made as prize. Captures by the navy on land, and on inland waters not navigable, have been held not governable by the prize act—that is, by this title. Not only must the captures be “as prize,” but they must be by the authority of the United States, or they must be adopted and ratified by the President. Such adoption by the President so retroacts as to render the “captures made as prize” constructively such as originally effected by authority

¹ XIII. Stat L., 315.

of the United States. In either case, however, the captures must be in accordance with the laws of nations.

Vessels of the navy are defined to be armed vessels officered and manned by the United States and controlled by the Navy Department.

§ 311. **Method of Conveying the Prize to the Court.** The method of capture is left by the statute as the usages of naval warfare have fixed it; there being nothing expressed but that the commanding officer of the capturing vessel shall secure the documents of the ship and cargo, including the log book, letters and other papers, and send them with an inventory, in a sealed package, with a written statement that they are all the papers found on board the captured vessel, and that they are in the condition in which they were found, to the court which is to adjudicate the prize. He must explain the absence, or change in condition, of any papers.

The method of delivering the prize for adjudication is prescribed no further than that the capturing officer shall send it to the court, under charge of a prize master and crew, with witnesses composed of the master and one or more other officers, (the supercargo, purser or agent,) of the captured vessel, "and any person found on board whom he may suppose to be interested in, or to have knowledge respecting, the title, national character, or destination of the prize." With the prize, he shall also send, by the prize master, the papers above mentioned, with an explanation of the absence of any of the witnesses.

§ 312. **To What Court.** The court to which the prize shall be sent must be the one most convenient to the probable claimants as well as to the captors, unless the capturing officer is otherwise instructed. To such court as may be designated by the Secretary of the Navy, shall be sent, in lieu of the prize itself, reports of the survey and appraisement of it, made by competent and impartial persons, if it is not in condition to be sent. "If the captured vessel, or any part of the captured property, is not in condition to be sent in" * * * is the language of the statute: the construction should be that such portion of the prize as is not susceptible of delivery may be

surveyed and appraised, and the reports substituted for the non-delivered part of the prize; not that such reports may stand in lieu of the whole capture because either the captured ship or some part is not in condition to be sent to the court for adjudication. No actual delivery of the prize itself, to the court, is required in such case, but the property, unless appropriated for the use of the government, (in which case the appraised value must be deposited as hereafter stated) must be sold by the authority of the commanding officer present, and the proceeds deposited with the assistant treasurer of the United States most accessible to the court to which the reports are sent, subject to the order of the court. That is, the proceeds are to constitute the *res* against which the prize proceedings are to be directed.

The prize master, having proceeded to the place of the court with his prize, must deliver the documents, explanations, etc., to the prize commissioners, making oath to their genuineness, to their condition and that of the prize property as being the same as when captured; or, in case of any change, stating and explaining it. He must report to the district attorney all his information respecting the prize and the capture, and deliver his witnesses to the marshal. When served with the process of the court, he must deliver the prize itself to the marshal.

§ 313. **Directions for Procedure.** The libel is left by the statute to the usual form of pleading known to prize practice. The only direction to the district attorney is that, on the information received from the prize master, he shall immediately file the libel and cause the issuance out of the court of an admiralty warrant, and shall proceed diligently to obtain a condemnation and distribution of the prize. It is made his duty to see that the proper preparatory evidence is taken by the commissioners, with the depositions *de bene esse* of the prize crew, and of others cognizant of facts bearing on condemnation or distribution.

If there be unreasonable delay in instituting proceedings, claimants may obtain a monition from the prize court to show cause why, or they may bring suit for restitution; and the service, in either case, shall be made upon the district attorney,

the Secretary of the Navy, and on such others as the court shall order to be notified.

§ 314. **Bonding.** Claimants cannot bond prizes, except in the following cases:

1. Where there has been a decree of restitution and the captors have appealed.

2. Where the court, after a full hearing on the preparatory proofs, has refused to condemn the property, and has given the captors leave to take further proof.

3. Where the claimant satisfies the court that the property has a peculiar and intrinsic value to him, independent of its market value.

In any one of these three cases, the court may, in its discretion, allow the claimant to take the property, on stipulation, deposit, or other security, if satisfied that the interests of others will not be prejudiced. The amount of deposit or stipulation is the appraised value of the property; and the nearest assistant treasurer is the proper custodian of such deposits.¹

§ 315. **Provisions Relative to Sale and Distribution.** Sale of prizes, *pendente lite*, shall be made:

1. When found liable to deteriorate, perish, or depreciate in value.

2. When the costs of keeping are found disproportionate to the value; and may be made:

When all the parties in interest who have appeared in the cause agree thereto, after the return day on the libel.

After condemnation, prizes must be sold, simply because the statute so requires, unless accepted by one of the departments at the appraised value. The war or navy department may retain a condemned prize, but the act requires the deposit of the appraised value that the moiety may be paid to the captors. Appeal does not prevent sale. The prize auctioneer makes the sales under the direction of the marshal.

The title contains many provisions, some of which would be observed by courts of nations without any expression by statute, while others are municipal in their character though not inop-

¹ The Florida, 101 U. S. 37, with reference to procedure.

erative, since they are in accord with public law. Among the further provisions, not necessary here to be particularly noticed in a treatise on suits *in rem*, are the mode of making sale, the duties of public officers, the rights of co-captors, the disposition of prize money, the fees of court officers and witnesses, the distribution of bounty and salvage, and regulations relative to recaptures.

§ 316. **Naval Captures on Land not Prize.** Mrs. Alexander's cotton was held¹ not to be maritime prize, because captured upon land. But it was stated, in the opinion, that it had been lawfully captured by the navy. "Being enemies' property, the cotton was liable to capture and confiscation by the adverse party," said the Chief Justice, citing the prize cases of 2d. Black, as authority. Admitting the general rule of modern usage that private property on land is not held confiscable, he points to the confiscation acts of 1861 and 1862 to show the sovereign expression of will to depart from such usage to a limited extent. He argues that cotton is liable under the act of 1861 because of its susceptibility of use to aid the enemy; but, in this, he is not supported by that act which is confined to the identical property which has itself been so used, or purchased, acquired, sold or given for such use, etc. However, when he says "the capture was justified by legislation, as well as by public policy," because the act of "August 6, 1861, declares all property employed in aid of the rebellion, with consent of the owners, to be lawful subject of prize and capture, wherever found," a right principle was doubtless stated, though not applicable to the cotton in question unless so employed with such consent. And when he refers to the act of July 17, 1862, as a further legislative extension of the rule, over enemies' property; and states that Mrs. A.'s property was classifiable among the confiscable property as designated by the act, on account of its ownership by an enemy of one of the designated classes, he shows conclusively that the cotton was liable under that confiscation act.

But it was not naval prize, he held, even under the naval act

¹ Mrs. Alexander's Cotton, 2 Wall. 404: Chase, C. J.

of July 17, 1862. The court thought it should have been turned over to the Treasury Department under the Captured and Abandoned Property Act—with what reason, we are not now called upon to discuss. As the cotton had been condemned and sold, the court ordered the proceeds to be paid into the treasury to await future suit in the Court of Claims, reversed the decree of the District Court, and remanded the cause with the mandate that the libel be dismissed.

The only allegation necessary in the libel, as to the hostile and confiscable character of a prize, is that it is enemies' property; or, what amounts to the same thing, that it was captured from the enemy.¹ This is the application of the general practice in prize pleading to prize cases in insurrectionary wars. It had been already held,² however, that though *The Venice* had been "undoubtedly enemies' property" before May 6, 1862, yet, that Gen. Butler's proclamation published on that date, in New Orleans, declaring that all rights of property should "be held inviolate, subject only to the laws of the United States," took her out of that category.

§ 317. **The Act to Protect Liens Upon Vessels and Other Property.** Notice, by the Supreme Court, of the act to protect liens upon vessels and other confiscable property,³ was taken in the consideration of the claim to a lien upon some two thousand bags of coffee, part of the cargo of *The Sallie Magee*.⁴ Mr. Lord, the proctor for the claimants, maintained that "by the doctrine of prize, a creditor having a mere lien, not being a direct proprietary interest accompanied with possession, cannot be heard in a prize proceeding. Whatever be his right, the captured property must be condemned. But the act of March, 1863, [*To protect liens, etc.*,] introduces certain new and benignant, though just features, into the code of prize." The court, without controverting this legal position, held that the lien was not satisfactorily established by evidence.

¹ *The Andromeda*, 2 Wall. 481; Chase, C. J.; *The Florida*, 101 U. S. 37.

² 12 St. at L. 762; Rev. Stat., § 5322.

⁴ *The Sallie Magee*, 3 Wall. 451: Swayne, J.

² *The Venice*, 2 Wall. 258: Chase, C. J.

When this question came up again, however,¹ the court held the act to protect liens, (above cited,) to be applicable to property proceeded against under the different confiscation laws, but not to that proceeded against as naval prize.

It will not be necessary to extend the subject of the judicial exposition of the prize act, since that act, in the main, is in strict conformity with the general law of prize which has been presented at sufficient length in the foregoing chapter, together with the judicial expositions, both of our own courts and of those of England, governing the subject in general.

¹ The Hampton, 5 Wall. 375: Miller, J.

CHAPTER XXXIV.

THE NON-INTERCOURSE LAWS.

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§ 318. **General Provisions of the Four Acts.** Trading with the enemy is sufficiently interdicted by international law: Congress, however, has thought proper to express the sovereign intent to apply the principles governing public wars to insurrectionary strife at home whenever it attains to such dimensions as to call forth the President's proclamation that a state of insurrection exists—not only to express such intent, but also to forbid commercial intercourse between the insurgents and other citizens "so long as such condition of hostility shall continue," and to declare that all goods *in transitu* between the territory occupied by the enemy, and that of the rest of the country, and all vessels and vehicles conveying such goods or persons, to or from the rebellious district, shall be forfeited.¹ But the President may permit intercourse for certain purposes.²

If any property be transported, or transportation of it be attempted, when the Secretary of the Treasury, having satisfactory reason to believe it intended for the insurgents, or in dan-

¹ Act 13 July, 1861, 12 Stat. at L. 257; 31 July, 1861, Id. 284; Revised Stat. § 5301.

² Acts July 13, 1861, 12 Stat. at L. 257; 2 July, 1864, 13 Stat. at L. 377; Rev. Stat. § 5304.

ger of falling into their possession or control, has prohibited such transportation by general regulations on the subject, which he is authorized to issue, and when such transportation or attempt is in violation of such regulation, it shall be forfeited.¹ The act of May 20, 1862, may be considered as supplemental to that of July 13, 1861, on the same general subject, non-intercourse; and the forfeiture denounced in this statute is for violation of the act as well as of the authorized treasury regulations. We need not here pause to discuss the limits of legislative warrant to confer upon an executive officer the power to make "regulations." The term is an indefinite one. If it means "laws" in the proper sense of the word, it is certain that Congress cannot delegate the law-making power; but if it means executive "rules" such as are necessary to the exercise of the executive functions, such "regulations" are clearly prescribable by executive officers, and the power is implied in the Constitution. In the same sense, judicial officers may make regulations necessary to the exercise of the powers granted to them. We do not say, here and now, however, that Congress can rightly prescribe forfeiture as the result of executive "regulations" yet to be made by a head of a department.

Fifteen days after the proclamation of insurrection, vessels shall be forfeited if belonging wholly or partly to an inhabitant of the territory proclaimed insurrectionary, and found in any other part of the United States, or at sea.²

§ 319. **Property Confiscable as Enemy Property Under these Acts.** The above provisions are the remains of the non-intercourse laws which still stand upon the statute book,³ so far as our subject is concerned. There are other forfeitures denounced, besides those herein mentioned, but they rather belong to the revenue laws than to the class we are considering in this chapter. There are, besides, criminal enactments intermixed with the statutes cited. The leading non-intercourse act, that of July 13, 1861, is remarkable for the versatility of its topics; as much so as the confiscation act of 1862. Both con-

¹ Act May 20, 1862, 12 Stat. at L. 257; Rev. Stat. § 5319.
404; Rev. Stat. § 5312.

² Rev. Sta., Title lxix., *verbo* "Insurrection," p. 1034.

³ Act July 13, 1861, 12 Stat. at L.

tain criminal provisions providing for trials *in personam*, indictments, personal penalties, fines and punishments. In the latter, the different forms of action are clearly expressed, in different sections or groups of sections, while in the former—the non-intercourse act of 1861—it requires study to decide, in some instances, if not between criminal and civil provisions, at least between those directed against citizen property and those against enemy property.

It seems safe to say that the property denounced as forfeitable, in the laws above freely rendered, (we have not quoted them,) is confiscable as enemy property, if libelled as such. The enemy character, *pro hac vice*, attaches by reason of its destination to or from the enemy, or unqualifiedly by reason of its ownership by an enemy belligerent or an aider or abettor of such. If, on the other hand, since insurgents are citizens, (for the most part,) as well as enemies, such property should be proceeded against without reference to international law, but under the forms of municipal procedure, perhaps, under the rulings of the courts in some cases based upon these laws, forfeiture might be decreed.

§ 320. **Captures on Inland Waters by the Navy.** It seems safe further to say, that these non-intercourse laws neither add to, nor take from, the scope of naval prize captures under international law. Take the law that insurgents' vessels "found" at sea, fifteen days after the proclamation, shall be forfeited: it is certain that a naval vessel must capture a vessel so found, as enemy property, and bring it in as prize, statute or no statute. The only use of the statute, in such case, is to fix the limit within which such enemy vessels would not be capturable or confiscable. If found by a naval vessel on navigable waters anywhere in the ports of the United States not declared insurrectionary, would the vessel there captured become naval prize? The answer must depend upon the construction of a section we have not yet presented: "No property seized or taken upon any of the inland waters of the United States, by the naval forces thereof, shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper offi-

cers of the courts.”¹ By the term “property” the legislator may not have had vessels in view, but the term includes them, nevertheless. And by the words “inland waters of the United States,” he may not have meant to include the Mississippi river, in case a confederate vessel of war had been “taken” upon it in battle, by our naval forces; nor may he have meant to include any navigable waters, but he has used unambiguous language of sufficient breadth to cover inland waters both navigable and unnavigable.

Because property “seized or taken” on inland waters is not naval prize, it does not follow that it is not enemy property, to be proceeded against as such. And vessels found in our ports, fifteen days after the proclamation of insurrection, are to be seized and libelled as enemy property, though not as naval prize. So, property caught *in transitu* between loyal and enemy territories of the United States, may be naval prize or not: if captured on the sea, between Charleston, when in rebellion, and New York, for instance, by a naval vessel, it would be naval prize; but, if captured or seized, between those cities, on land or inland waters, it would not. In both cases, it would be confiscable as enemy property.

§ 321. **Whether Confiscable as Naval Prize?** Mrs. Alexander’s cotton was said, by the Supreme Court, to be confiscable as enemy property, under either of the Confiscation Acts, but not as naval prize, though taken by the navy;² yet a different rule seems to have prevailed in the case of *The Hampton*,³ captured on a creek in Virginia, and held to be naval prize. The court said the vessel was liable either under the non-intercourse act of July 13, 1861, or under international law, irrespective of the statute; and that, though the act to protect liens⁴ would have been applicable had the proceedings been instituted under the former, it was not under the latter.

So, also, in *The Ouachita Cotton*.⁵ It had been bought by the claimants of a known cotton agent of the Confederate

¹ Act July 2, 1864, 13 Stat. at L. 377; Rev. Stat. § 5310.

² Mrs. Alexander’s Cotton, 2 Wall. 404; Chase, C. J.

³ 5 Wall. 372.

⁴ Revised Statute, § 5332.

⁵ The Ouachita Cotton, 6 Wall. 521.

States. It was "captured" on land, on the plantation where it had been raised, by gunboats of the United States; conveyed to Cairo; libelled and condemned as prize of war by virtue of the non-intercourse act of July 13, 1861; and the decree was affirmed by the Supreme Court. This decision may be compared with that of *Mrs. Alexander's Cotton*, and also with *Weed's case*.¹

The case of *Weed* was cited as being of authority, in the case of *The Cotton Plant*.² This steamboat had been captured on Roanoke river, one hundred and thirty miles from its mouth, by a naval force detached from two steamers that had proceeded up the river till stopped by apprehension of low water. One of the Federal steamers stopped eighty, and the other, one hundred miles from the mouth; and the capturing force proceeded, without the vessels, to the place of the *Cotton Plant*, and captured her. The captured steamboat was libelled and condemned as naval prize of war, in Philadelphia; but the Supreme Court held that because the capture had been upon "inland waters," as that phrase is used in the act of July 2, 1864, the *Cotton Plant* could not be regarded as maritime prize, and the decree was reversed, though the case was remanded for further proceedings of a different character.³

§ 322. **Illicit Trading.** It was held, where money was in the treasury as the proceeds of cotton captured, and was claimed under the Captured and Abandoned Property Act, that if the claimant had served the "Confederacy" during the entire war, he would be entitled to recover the proceeds. The reason given is that he, in acquiring the cotton by an agent appointed before he left the enemy lines, did not trade across the lines. This would doubtless have been a good reason for not condemning property under the non-intercourse laws; but must not any claimant of proceeds, under the first mentioned act, affirm and prove his loyalty?⁴ May any enemy recover his captured property after the war?

In the case of *Quigley*, it does not appear that he had been

¹ *United States v. Weed*, 5 Wall. 62. *Homeyer*, 2 Bond, 217.

² *The Cotton Plant*, 10 Wall. 577.

⁴ *United States v. Quigley*, 103 U.

³ See *United States v. Steamer* S. 595.

disloyal, and he may have made the necessary proofs entitling him to the proceeds which he claimed, and the decision may be perfectly just, since persons within the enemy lines might trade with each other without violation of the non-intercourse acts,¹ where the subject of the contract was also within those lines. The objectional doctrine of the Quigley decision is found in the suppositious remark of the Court of Claims, reasserted by the appellate court, that if Quigley had been an enemy throughout the war, and his cotton captured as hostile property, he could have recovered it. If this is right, it would seem that the capture must have been illegal; yet, it is held lawful for a military officer to seize rents;² and that captured cotton belongs to the United States, where the bill of sale is evidence of the enemy character of such property.³ Such proceeds are constructively in the treasury, though they may have been applied to freedmen;⁴ but it has been said that where the proceeds of captured and abandoned property were placed in the treasury before the passage of the act specially concerning such property, they could not be considered booty of war.⁵

§ 323. **The President's License.** The power to license trade with the enemy was confided to the President.⁶ He could permit commercial intercourse between places within the lines of military occupation by the forces of the United States, and places under the control of insurgents against it; but the general orders of the commander of the Department of the Gulf, could give no validity to such intercourse.⁷ "The President alone could license trade with the rebel territory; and, when thus licensed, it could be carried on only in conformity with the regulations prescribed by the Secretary of the Treasury."⁸ And, in the case of *Coppell v. Hall*, which we have just above

¹ *Bond v. Owen*, 7 Baxter, 340.

² *Gates v. Goodloe*, 101 U. S. 612.

³ *Gilmer v. United States*, 14 Ct. Cl. 184.

⁴ *Fluker v. United States*, 14 Ct. Cl. 252.

⁵ *Goodman v. United States*, 14 Ct. Cl. 547.

⁶ *The Venice*, 2 Wall. 258; *The Sea Lion*, 5 Id. 630; *The Reform*, 3 Wall. 632; *The Ouachita Cotton*, 6 Wall. 531.

⁷ *Coppell v. Hall*, 7 Wall. 556; Swayne, J.

⁸ *Id.*; *United States v. Lane*, 8 Wall. 185; *Davis, J.*; *Hamilton v. Dillon*, 21 Wall. 74; *Bradley, J.*

cited, the court said of the rebellion, "The war, in many respects, was conducted as if it had been a public one with a foreign enemy. When international wars exist, all commerce between the countries of the belligerents, unless permitted, is contrary to public policy, and all contracts growing out of such commerce are illegal." And they then applied the principle of public law, with regard to trade with the enemy, to the war between the insurgents and the United States, and held that Congress had given the licensing to the President and the regulation of such licensed trade to the Secretary of the Treasury. The absence of power in military authorities to license such commercial intercourse, under the act of July 13, 1861, has been repeatedly held.¹ But a permit by a proper treasury agent, to purchase cotton in a certain region, was held to create a presumption that the region was within the military lines of the United States.² And it was said in *Weed v. United States*: "The fact that the proper officers issued these permits for certain parishes, must be taken as evidence that they were properly issued, until the contrary is established."³

§ 324. **Treasury Trade Regulations.** The 22d. Treasury Regulation, in force when E. J. Gay's gold was seized in Louisiana, forbade all transportation of coin or bullion to any State or section declared to be in insurrection, except for military purposes, under military orders, or under special license of the President. The Supreme Court sustained this rule as authorized by the Statutes of July 13, 1861 and May 20, 1862, on non-intercourse, and affirmed the condemnation of the coin which had been confiscated in New Orleans.⁴ The Treasury regulations have repeatedly been treated by the judiciary as having the force of law,⁵ when within the statutes authorizing them; but a contract made by a purchasing agent of the treasury, without such authority, was held inoperative and void.⁶

§ 325. **General Law of Non-Intercourse Applied.** In the

¹ The Ouachita Cotton, 6 Wall. 521; McKee v. United States, 8 Wall. 163.

² Butler v. Maples, 9 Wall. 766: Strong, J.

³ United States v. Weed, 5 Wall. 73.

⁴ Gay's Gold, 13 Wall. 362: Miller J.

⁵ Maddox v. United States, 15 Wall. 58: Davis, J.

⁶ Id.; United States v. Lane, 8 Wall. 185: Davis, J.

case of *United States v. Lapègne* the general principle governing belligerents in public wars was fully applied to the war with the insurrectionists here, as indeed, it had generally been applied by the Supreme Court, from time to time. It was said: "All commercial contracts with the subjects or in the territory of the enemy, whether made directly by one person, or indirectly, through an agent who is neutral, are illegal and void." A firm in New Orleans had sent an agent to the country to buy cotton. After his departure, the city was brought within the Union lines: held, that his purchase of the cotton, after that date, was a purchase by his principals within our lines, of the vendors within the enemy's lines, and therefore void.¹ It had previously been held that cotton within the enemy's lines, with its owner, sold by his agent who was within our lines, at New Orleans, to a British subject, then in that city, was enemy property; and that the sale was void.² Had the cotton been in New Orleans, and both vendor and purchaser been enemies within the enemy's lines, would the sale have been good? It certainly would not, so far as enforcing such a contract in the courts of the country, is concerned. It would not have been good as to the United States. The *status* of the cotton would not have been affected at all by such sale, since it had been that of a hostile thing before the contract as fully as it was afterwards. But the sale itself could not be deemed a transfer of the property, since there could not possibly be delivery without contravention of law. Neither party could cross the military lines, nor send an agent across, nor write across, to effect delivery. If the government should not choose to exercise its right to take it, any judgment-creditor of the *pseudo* vendor may execute it as his debtor's property. If, instead of a sale, the contract should purport to be nothing more than a giving in payment where there could be no possible delivery of such pay, to hold the contract good *quoad* third parties would seem to be preposterous in the extreme.

Whether such contract be one of sale, or a mere *dation en*

¹ *United States v. Lapègne*, 17 Wall. 603: Hunt, J.

² *Montgomery v. United States*. 15 Wall. 395: Strong, J.

paiement under the civil law of Louisiana, if both the contracting parties be enemies within the enemy's lines while the subject of the contract is situate within our own lines, the contract would be an absolute nullity as to all other persons. Cotton, so illegally contracted about, might be seized, libelled, described in the libel by the marks, etc., and also as the property of the vendor X, and confiscated. Could the purchaser, Y, be heard to plead in a collateral action by him instituted, that the cotton was his at the time of its condemnation, by virtue of such sale? by virtue of a mere giving in payment with delivery impossible?

§ 326. **Trade With Contiguous Foreign Ports.** Under the supplemental non-intercourse act of May 20, 1862, collectors of customs were authorized to require a bond, with satisfactory security, when clearing a vessel to a foreign or domestic port, if he deem it necessary, conditioned that the goods shipped should be landed at the designated port, and that no part of them should be used in affording aid or comfort to any person in insurrection against the authority of the United States.¹ Under this provision, a bond was taken by the collector of the port of New York, upon clearing the *Sarah Marsh* and cargo for Matamoras, which, though going beyond the literal authorization of the act, in some of the stipulations of the bond, was sustained by the Supreme Court.²

The conditions of the bond were that the vessel should land her cargo at Matamoras for consumption; that it should be consumed in the republic of Mexico; that the shipper should, within seven months, produce proof satisfactory to the collector, by consular certificate or otherwise, that the cargo had been so landed and gone into consumption; that all departmental regulations should be obeyed; and, especially, that none of the cargo should be transported to any place under insurrectionary control.

§ 327. **Communication Forbidden.** The non-intercourse acts accord with the general doctrine of the law of nations,

¹ R. S. § 5321.

² United States v. Mora, (7 Otto,) 97 U. S. 415: Bradley, J.

that an enemy cannot cross the line to the country of the opposite belligerents for any purpose, nor send an agent across, nor send any communication across; that, on the other hand, no visit can be made to him, nor agent sent to him, nor communication held with him, by the subject of any government at war with him. Only under flags of truce can even military opponents communicate.

Yet not only non-intercourse laws, but the laws of nations, seem to have been overlooked, when it was said with great emphasis, in *McVeigh, Plaintiff in Error v. The United States*,¹ that even if he had been an alien enemy he ought to have been allowed to appear before the District Court of Virginia to claim the enemy property seized and libelled, and described as belonging to him; that McVeigh, *in his character as enemy*, ought to have been allowed to cross the rebel lines, and to come into court, to respond to the general monition. Judge UNDERWOOD, following the non-intercourse acts, and the *jus gentium* and the line of decisions which was without a break on the point that an enemy has no judicial standing, had refused to allow McVeigh to claim, unless he disavowed his enemy character, by taking the oath of allegiance, as all litigants were required to swear to their loyalty in those war times.

The Supreme Court placed his position precisely upon the supposed one of an alien enemy, coming to the court of a country while fighting to destroy it. This was in accord with what had been said of insurgents in the consolidated prize cases:² that they were "none the less enemies because they were traitors."

There was seized, during the revolutionary war, property for confiscation: could a recreant general recross the enemy's lines, (after having gone within them as a traitor, and after having become no less an enemy because he was a traitor,) and come within our own, on the business of filing a claim in court to such seized property? Could a foreign enemy come rightfully within our lines to become a claimant in our courts? Would England, if at war with France, allow a French subject

¹ *McVeigh v. United States*, 11 Wall. 259: Swayne, J.

² *The Amy Warwick et al.*, 2 Black. 671.

to enter Westminster Hall, to use the court while fighting to destroy it? May a spy, when arrested within the opposite belligerent's lines, justify his presence there, on the ground of having gone to plead in his enemy's court?

It is no answer to say that the proceedings *in rem* were treated as a personal suit; for, even in such case, neither the laws of nations nor our regulative non-intercourse statutes respecting them, permit an enemy's coming to plead, or sending an agent, or communicating with a lawyer on our side, for that purpose.

Other cases of McVeigh are in the reports, with the same exception to the *jus gentium*.¹ He brought ejectment suits against Windsor and Gregory, respectively, and gained them on the ground that they, the purchasers of confiscated enemy property, had acquired no rights *quoad* himself, because he, being an enemy, had not been allowed to claim the property and to defend it against the United States.

§ 328. **Enemies Within their own Lines Contracting about Property Within the Opposite Lines; Delivery, Recording, Etc.** Persons, defaulted in a cause *in rem* with general notice, brought action against the purchaser of hostile land condemned and sold in said case *in rem*, and averred that they had acquired it while they were officers of the confederate army, and that they and their vendor were within the confederate lines when contracting, though the land was within the Federal lines.² They had not responded to notice. Though enemies may contract among themselves, it would seem that where delivery is required to complete the transaction as to third persons, it is not practicable to effectuate it without the crossing of the hostile lines and the violation of the rule of non-intercourse. In dissenting from the judgment giving the defendants in error the previously condemned property, Mr. Justice CLIFFORD said, with reference to delivery, recording of title, etc., in the parish of Louisiana where the real estate was situated, and which was within the Union lines at the time of the alleged conveyance to the plaintiffs: "Neither delivery of the subject-matter nor registry of the act

¹ Windsor v. McVeigh, (3 Otto,) 93 U. S. 274: Field, J.; Gregory v. McVeigh, Id. 284: Field, J.

² Burbank v. C. A. & L. L. Conrad, 96 U. S. 291.

of sale could lawfully be made, and whatever was unlawfully done was a nullity, leaving the title of the property as if the unlawful act had not been done.

“Provision is made by law for the appointment of a register of conveyances in that parish, and it is made his duty to register all acts of transfer of immovable property passed in that city and parish, in the order in which the acts shall be delivered to him for that purpose; and it is provided that ‘acts, whether they are passed before a notary public or otherwise, shall have no effect against third persons but from the day of being registered.’—(Rev. Stats. La., (1870,) p. 613, sec. 3159.)

“Conveyances of the kind must be registered in the public registry of the parish or district where the premises are situated.—(Sess. Acts, (La.,) 1827, p. 136; Rev. Stat. 1870, p. 613; *Dooley v. Delany*, 6 La. An. 67; Code 1824, arts. 2250, 2417, 2242; Code 1870, arts. 2246 to 2266.)

“Sales of immovable property made under private signature do not have effect against the creditors of the parties nor against third persons in general only from the day such sale was registered according to law and the actual delivery of the thing sold took place.—(Art. 2442.)

“Registration of such conveyance in another and different district is not notice to third persons nor to subsequent purchasers or attaching creditors.—(*Pierce v. Blunt*, 14 La. An. 345; *Carraby v. Desmare*, 7 Martin, (N. S.) 662; *Gravier v. Baron*, 4 La., (Miller,) 241; *Wells v. Baldwin*, 5 Martin, (N. S.) 146; *Smith v. Creditors*, 21 La. An. 241.)—State authorities to that effect are numerous, but inasmuch as the question is one of decisive importance it is deemed advisable to refer to all the leading cases.—(*Lee v. Darramon*, 3 Rob. (La.) 161; *Gradenigo v. Wallett*, 9 Id. 14; *Crear v. Sowles*, 2 La. An. 598; *Tulaine v. Levinson*, 2 Id. 787; *Tear v. Williams*, 2 Id. 689; Sess. Laws (La.) 1855, p. 345.)

“Third persons with respect to a contract or judgment are defined by the Code of 1824 to include all persons who are not parties to a judgment or contract, and the same definition is given to the same phrase by the Code of 1870, which is more

immediately applicable to these cases.—(Code 1824, art. 3522, n. 32, p. 1110; Code 1870, art. 3556, n. 32, p. 428.)

“Persons having no pecuniary interest in an appeal and are not aggrieved by the decree are properly denominated third persons in respect to appeal.—(*Morrison v. Trudeau*, 1 Martin, (N. S.) 354; *Williams v. Trepagnier*, 4 Martin, (N. S.) 342; *Lafitte v. Duncan*, 4 Id. 622; *Henderson v. Cross*, 2 Rob. (La.) 391.)

“Those not parties to a written agreement or instrument by which their interest in the thing conveyed is sought to be affected are properly designated as third persons in the jurisprudence of that State.—(*Brosnaham v. Turner*, 16 La. (Miller,) 454; *Wade v. Marshall*, 5 La. An. 157; *Williams v. Hagan*, 2 La. (Miller,) 125; Code 1824, art. 3522, n. 32; *McManus v. Jewett*, 6 La. (Miller,) 541; *Kittridge v. Landry*, 2 Rob. (La.) 79.)”

§ 329. **Enemies “Giving in Payment” what Cannot be Delivered.** Delivery is of the essence of *dation en paiement*. One might as well attempt to pay a debt with money and yet keep the money in his pocket, as to pay it with land, yet not deliver the land. Lots, professedly given in payment, were never delivered; and, during the state of war, with the contracting parties on one side of a hostile line and the “lots of ground” on the other, they could not be. This was also very clearly shown in the dissenting opinion, with reference to giving in payment, in Louisiana: “It is of the very essence of the *dation en paiement*,” say the Supreme Court of the State, “that delivery should actually be made. Neither a sale nor a *dation en paiement* can avail against an attaching creditor when there has been no delivery.”—(*Shults v. Morgan*, 27 La. An. 616.)

“Pothier says that a gift in payment is an act by which a debtor gives a thing to his creditor who is willing to receive it in the place and in payment of a sum of money or of some other thing which is due to him.—(Pothier, by Cushing, sec. 601, p. 365; 7 Merlin Répertoire, *Verbo Dation en paiement*, p. 55.)

“Giving in payment, as defined in the jurisprudence of Louisiana, is an act by which a debtor gives a thing to the creditor who is willing to receive it in payment of a sum which is

due, and the decision is that it differs from the ordinary contract of sale in this: that the latter is perfect by the mere consent of the parties, even before the delivery, while the giving in payment is made *only* by delivery.—(Code 1824, arts. 2625, 2626.) And the Code of 1870 employs the same exact words.—(Arts. 2655, 2656; *Durnford v. Brooks*, 3 Martin, 227; Same case, 3 Id. 269.)”

§ 330. **Different From Sale.** Article 2656 of the Civil Code of Louisiana, (1870,) is as follows: “The giving in payment differs from the ordinary contract of sale in this, that the latter is perfect by the mere consent of the parties, even before the delivery, while the giving in payment is made only on delivery.” And the articles immediately following further show the difference between the two contracts.¹ And, the civil law jurists have recognized the distinction.²

Yet, with these authorities, and the article C. C. 2656 before them, the Supreme Court say, with reference to this *dation en paiement*, that the law of Louisiana “considers the tradition of immovables as always accompanying the public act which transfers the property,” and they cite C. C. 2455 and Louisiana decisions, *all of which concern the contract of sale* and not that of the giving in payment.³

It is needless to follow the opinion to show that contracts of sale between enemies are good as to themselves, for every one will readily concede this, though the contract of *dation en paiement* forms an exception, if there be no delivery of the thing alleged to be paid, whether real or personal; and sales, too, form an exception, when rights of third persons intervene.

When it is asserted that sales are good against third persons,

¹ La. Civil Code, Arts. 2657, *et seq.*

² Troplong, *De la Vente*, Nos. 7, 157, 179; and Pothier and Merlin, cited by Justice Clifford, *vide* previous foot note.

³ The title was not good as a sale because: (1.) There was no fixed price. (2.) No description of the property corresponding with the description in the plaintiff's petition.

(3.) No notarial acknowledgment as required by law to constitute it a public or authentic act. It was not even a legal “executory agreement to sell;” it was a pollicitation merely. And it was never recorded, as no official signature accompanied the inscription as required by La. Statutes, Act 1855, p. 345; Hennen's Digest, *verbo* “Registry, II.”

in Louisiana, without being recorded, what is to be done with the contrary provision of the law of that State?¹ Of course, the *lex rei sitæ* must govern.²

§ 331. **Such Contracts Not Good as to the United States.** It is clear, therefore, that if it be conceded, that all the clauses of the fifth section of the Confiscation Act of 1852, including, of course, that under which members of the Confederate Congress are classified, (to which class the vendor belonged in this case,) are exceptional to the general rule of retroaction; and that the hostile *status* of the property must have originated after the passage of that act; and that the *res* must necessarily belong, at the time of the seizure, to the particular enemy named in the libel, still the opinion remains unsupported, for the reason that the property had never changed hands *quoad* the United States.³

But it is, by no means, conceded that the clauses are all exceptional. It was held by the Supreme Court, upon affirming the confiscation of *Conrad's Lots* and *Slidell's Land*, (the former including the lots litigated in Burbank's case,) that names are nothing, and that enemies' property is always the *res* in confiscations under the act, irrespective of personal owners.

These decisions, affecting the non-intercourse acts, were not rendered in exposition of those acts, but of another statute authorizing proceedings *in rem* under the law of nations against property owned by enemies, and against that only: so, if enemies could eject the purchaser of property condemned pursuant to that act, on the ground that they were denied standing in court, or that they could not have such standing, it follows that no property whatever could be effectually condemned under that act; and the statute itself would become entirely nugatory.

¹ "No notarial act concerning immovable property shall have any effect against third persons until the same shall have been recorded, etc." See Revised Statutes of La. (1870,) § 617.

² *United States v. Crosby*, 7 Cr. 115; *Curtis v. Hutton*, 14 Ves. 541; *Clark v. Graham*, 6 Wh. 579; *Kerr v. Moon*, 9 Wh. 570.

³ *Desmare v. United States*, 3 Otto, 610; *Mitchell v. United States*, 21 Wall. 352.

But, on the contrary, under the view held by all the publicists,¹ if an enemy were to avow his enemy character, or even fail to deny it under oath, that circumstance alone would justify complete condemnation on the ground that the property is enemy property, even if the judicial standing were conceded.

¹ *Griswold v. Waddington*, 16 Johns. 469, 477, and the numerous authorities therein cited.

CHAPTER XXXV.

THE INSURRECTION LAWS.

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§ 332. **Hostile Employment.** The act "to confiscate property used for insurrectionary purposes"¹ is a further expression of the political power of the government that, in the prosecution of war against domestic enemies, confiscation was not to be confined to naval prizes.

Private property, found on land, besides that authorized to be proceeded against, by the non-intercourse laws, was to be seized and condemned. But this statute authorizes the confiscation of a very limited portion of enemy property. It limits confiscation to such as has derived its enemy character by use, imputing enemy ownership. It is distinguishable from the act of 1862, directed against enemy property which has derived that character from simple ownership.

This act is for the confiscation of "property used for insurrectionary purposes." Such property is, by the act, subdivided into the following classes:

1. Property knowingly used by the owner in aiding insurrection.
2. Property purchased or acquired by the owner, with intent to aid insurrection.

¹ Act Aug. 6, 1861, 12 Stat. at L. 319; R. S., §§ 5308, 5309, 5311.

3. Property purchased or acquired by the owner's agent or employé, with such intent.

4. Property sold or given, by owner or agent, with such intent.

5. Property, to the use of which, to aid insurrection, the owner consented.

6. Property, to the use of which, to aid, abet, or promote persons engaged in insurrection, the owner consented.

7. Property which the owner suffered to be used to aid in insurrection.

8. Property which the owner suffered to be used to aid persons engaged in insurrection or aiding insurrection.

9. Property which the owner's agent suffered to be used in aiding insurrection; and,

10. Property which the owner's agent suffered to be used in aiding persons engaged in aiding insurrection.

§ 333. **Subject of Prize and Capture.** "Any property, of whatsoever kind or description," falling under any one of the above classifications, is declared "lawful subject of prize and capture;" and, if this stood unqualified, one might think that the objects and places of naval prize captures had been extended beyond the modern rule of nations concerning enemy property. He might be further inclined to think so, by the words additional to our quotation above from the statute, "wherever found." The concluding words of Section 5308, Revised Statutes, which immediately follow: "And it shall be the duty of the President to cause the same to be seized, confiscated and condemned;" and the provisions of Sections 5309 and 5311, both from the original act, are not contrary to this view. And it is not a forced construction to say that property that comes under any one of the above ten designations may be captured by the navy at sea, as naval prize, even in cases where it would not be considered either contraband or in any wise confiscable under the rules of international law. This act, therefore, in a certain, confined sense, may be said to be an enlargement of the ordinary bounds of naval captures. Manifestly, however, this extension of the naval authority is but a small part of the act. Leveled entirely against enemy property so made by use or

intent to use for hostile purposes, the act authorizes seizure by other methods than capture. Such seizure may be made on land or sea, wherever the hostile thing be found. The language is that it shall be "confiscated;" the term "forfeited" which prevails in the non-intercourse acts, is not here employed.

§ 334. **Jurisdiction of the Courts under the Act.** There is obscurity in the designation of the tribunal which is to test the status of the thing seized: it is to be the Circuit or District Court of the United States having jurisdiction of the amount, or in admiralty in any district in which "such prizes and capture" "may be seized, or into which they may be taken and proceedings first instituted."¹

One would be disposed to think from this section alone, that naval prize only is meant, since the phrase "such prizes and capture shall be condemned" is more consonant with maritime law than with any other branch of jurisprudence; and the provision that the proceedings for condemnation are to be in any district into which *prizes* may be taken, further favors this view; but the giving of the jurisdiction to either the circuit or district court to be determined, in any given case, by the amount involved—that is, the value of the prize; and the naming of the district, in which the condemnation is to be had, as either the one in which the prizes "may be seized" or "into which they may be taken" give this section a broader view.

The terms "prize and capture" cannot be confined to their technical significance; for "seizure" is used, in the same section, as synonymous with "capture;" and, the section immediately preceding, in the original act, closes as follows: "All such property is hereby declared to be lawful subject of prize and capture wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, confiscated and condemned." And in the third section, the condemnation is to be wholly for the benefit of the United States, unless there be an informer; in no case do captors have interest as in naval prize condemnations.

§ 335. **When in Admiralty.** The mention of the admiralty,

¹ Section 2 of the original act, 12 S. L. 319.

in the designation of the courts, though obscure, must be understood to mean, that when property used for insurrectionary purposes, and confiscable under the extension given to enemy property captures by this act, but not confiscable under the ordinary rules of international law, shall be taken at sea, or upon any navigable waters, the district court, sitting in admiralty, shall have jurisdiction. In such case, the proceedings ought to be in admiralty and not at law, even in the absence of any designation of tribunal in the act.

The circuit and district courts have original and concurrent jurisdiction of all other property seized or captured by direction of the act. The phrase "having jurisdiction of the amount" must be construed to be meaningless.

The decisions of the Supreme Court that the proceedings *in rem* under direction of this act, must be on the law side of the court, and tried by jury when there is issue joined,¹ were rendered in cases where the seizure had been made on land, and are doubtless entirely correct on this point; but, had the question been fairly put, in case of the capture by a naval vessel, at sea, of property not contraband of war nor ordinarily liable for any reason as naval prize, but made prize by the political expression of the sovereign in this act, they could hardly have held the proceedings should not be in admiralty.

§ 336. **The Circuit Courts.** The Supreme Court, indeed, have expressed the opinion that the act confers admiralty jurisdiction on both the Circuit and District Courts, in cases arising thereunder, without special reference to naval captures. In speaking of the section relating to jurisdiction, they say: "The difficulty of construction arises from the terms in which jurisdiction is granted 'to any District or Circuit Court, having

¹ *Union Ins. Co. v. United States*, 6 Wall. 759; *Armstrong's Foundry*, Id. 766; *St. Louis Street Foundry*, Id. 770; *Morris' Cotton*, 8 Wall. 507; *United States v. Hart*, 6 Wall. 772; None of these foundry cases were instituted as admiralty causes, which may be seen by inspection of the records. The only error was in calling

the warrant an admiralty warrant, which was certainly a harmless misnomer by the clerk or other officer. The real error was in refusing jury trial where issue had been joined; but that did not make the case one of admiralty in form. And no doubt the cases were at law, and should have gone up by writ of error.

jurisdiction of the amount, *or* in admiralty, in any district in which the property is found.' It is said that the use of the disjunctive '*or*' restricts the jurisdiction in admiralty to the District Courts. And this view is certainly not without some warrant in the phraseology of the act. But when we look beyond the mere words to the obvious intent we cannot help seeing that the word '*or*' must be taken conjunctively; and that the sense of the law is that both the Circuit and District Courts shall have jurisdiction 'according to the amount' *and* 'in admiralty.'"¹

§ 337. **The Hostile Use of Property Renders the Owner an Enemy Pro Hac Vice.** The writer does not wish to be understood as assenting to the view expressed in *Armstrong's Foundry*, that the statute regarded the consent of the owner to the employment of his property in aid of the rebellion as an offense, and inflicted forfeitures as a penalty. He sets over against it the view expressed, in *Cook's Foundry*, the immediately preceding case, (reported as *Union Ins. Co. v. United States*,) and precisely like *Armstrong's Foundry*, "that the Cooks established their manufactory of arms on the ground leased them with the full consent and knowledge of Leonce Burthe: it thus became within the express terms of the act the lawful subject of prize and capture from the time of that establishment."²

§ 338. **Is the Limit to Treason Forfeitures Applicable?** Misled by the decision in the case of the *Armstrong Foundry*,³ the United States Circuit Court, in Florida, held that a similar case, in which the United States had proceeded against some land knowingly used for insurrectionary purposes, was of a personal character, with the forfeiting limited to the owner's estate for life. The decree of the United States District Court had been the final condemnation of the land itself, as the *res*. That decree did not come up to the Circuit Court for review; but the court, in the maintenance of a collateral attack in ejectment, ruled as above stated.

¹ *Union Ins. Co. v. United States*, 6 Wall. 764.

The Union Ins. Co. v. United States, 6 Wall. 765, 769.

² 6 Wall. 766.

The collateral case was taken to the Supreme Court,¹ and the Circuit Court judgment affirmed: the court saying that the bills of exception did not properly present a question for their decision. The defense to that collateral action must have been very lame indeed if it did not meet the ejectment suit with the plea of *res judicata*. If the record of the case against the land was in evidence, showing that the District Court had had jurisdiction over the *res* and the subject matter, and had exhausted that jurisdiction, it is difficult to see how the affirmative fact of jurisdiction in the Circuit Court could be established.

The decision in this ejectment suit went far beyond that of Armstrong's Foundry; but the Supreme Court, in affirming the decree, are not to be understood as adopting its reasons.

§ 339. **The Act Embraces all Property Used for War Purposes.** The hostile things declared confiscable by this act, embrace every species of property bought, sold, acquired, given, used, intended to be used, etc., for war purposes, and no other property. It therefore includes real as well as personal property, if thus made subservient to the cause of insurgent enemies. Land, if instrumental in promoting rebellion, by being used as the site of a manufactory of fire-arms, may be condemned with the factory building standing upon it, but not any considerable amount of land therewith, though constituting a farm or plantation with the site of the factory included in the tract. A body of land of great extent might be condemned, however, if bought, sold, acquired or given, to aid the enemy. It would not even require the forms of condemnation, if owned by the enemy government.²

It has been contended that the language of the second section, in connection with the courts in which condemnations are to be had, "such prizes * * * shall be condemned * * * in any district in which the same may be seized, or *into which they may be taken*, confines the operation of the act to movable property." The ready answer is, the first section expressly declares that "*any* property, of whatsoever kind or description,"

¹ Jones v. Buckell, not yet reported; decided in 1882: Waite, C. J.

² United States v. Huckabee, 16 Wall. 414.

if used, purchased, etc., for insurrectionary purposes, shall be "seized, confiscated and condemned."¹ And, "all such property is hereby declared to be lawful subject of prize and capture wherever found." The title is, "An Act to confiscate property used for insurrectionary purposes."

§ 340. **Land Confiscable Under the Act.** Can land be bought, sold, acquired, given, for insurrectionary purposes? As it can, it is clearly embraced within the terms of the act.

Real estate is confiscable, as enemy property, by the laws of nations, if any belligerent sovereign chooses to avail himself of the ancient right;² and, what he may do as a whole, he may do in part; he may confine himself to what real estate is sold or used to aid the enemy, acquiring its hostile character in this way, if he prefers so to confine himself.

§ 341. **Seizure of Either Real or Personal Property "Wherever Found."** The phrase, "wherever found," seems to cover the enemy's territory, as well as such of the country as is not declared in insurrection. Movables, or immovables, used or sold for insurrectionary purposes, become confiscable enemy property under the law of nations, by direction of sovereign will expressed in this act, whether lying within or without the enemy's lines. Such use, without this statute, would render property hostile; with this statute, such use renders it confiscably hostile.

As it is physically impossible, as a general rule, to make seizure of property thus confiscably hostile while it is within the enemy's military lines, may it not be seized and proceeded against after such insurrectionary territory has been brought within the sovereign's lines? If not, the statute involves the absurdity that the government has the right to seize and confiscate when it physically cannot, yet not the right so to do when it physically can.

The case,³ of a vessel in Lake Pontchartrain, held to have been enemy property before Gen. Butler's proclamation of May 6, in New Orleans, but not such thereafter, was decided, not on

¹ Union Ins. Co. v. United States, 6 Wall. 765.

² Smith v. State of Maryland, 6 Cr. 286; Martin v. Commonwealth. 1

Mass. 347; Borland v. Dean, 4 Mason, 174; 4 Kent's Com. 426.

³ The Venice, 2 Wall. 258; Chase, C. J.

the principle that all enemy property ceases to be such when the territory in which it is ceases to be such, but on the effect to be given to the terms of the proclamation.

Property, confiscably hostile under this act, embraces such as is owned or controlled by aliens, as well as by citizens, provided it is used for insurrectionary purposes. It is not necessary that the court should have jurisdiction over the person of the owner, since jurisdiction over his property is sufficient. The proceedings are to condemn the property—not him. He may be domiciliated abroad and he may never have been for a moment within the United States; yet, if he has property here which he suffers to be used against the government, in aid of domestic enemies, it becomes confiscably hostile under the direction of the statute, and he becomes an enemy *pro hac vice*.

§ 342. **Limitation to Property “Knowingly Used,” Etc.** There are limitations to the confiscability of property used for insurrectionary purposes. The use, including the sale, consent to use, sufferance, etc., is qualified by the adverb “knowingly.” An iron foundery, in which cannon is molded for insurrectionary purposes, without the knowledge, consent or willing sufferance of the owner, his agent or employé, is not confiscable. Even though it is situated within the insurrectionary territory, and therefore enemy property, it is not confiscable enemy property under the direction of the act.

A claimant, (denying the enemy character imputed to him, as he must, upon appearing and entering into stipulation as a claimant,) may remove the presumption of knowledge, and thus save the defendant *res* from condemnation. The presumption is against him, when the use has been established. The law presumes everything that is done to be knowingly done. When the using of the *res* for insurrectionary purposes has been alleged in the libel to have been knowingly done, and when the knowledge is denied by the claimant in his answer as defendant for the *res*, where lies the burden of proof as to the *scienter* of the owner? “Although, in general, it is necessary for a party who brings an action to prove all the material facts which he alleges in support of his claim, yet, where the defendant pleads a fact within his own knowledge in discharge of himself, and

the plaintiff still insists on the defendant's liability, alleging the same fact in his replication, there the burden of proof lies upon the defendant—not upon the plaintiff.”¹

§ 343. **Presumption of Knowledge.** The owner of land is presumed to know whether his lands are in the adverse possession of another.² “Other presumptions of this class are founded upon the experience of human conduct in the course of trade; men being usually vigilant in guarding their property, and prompt in asserting their rights, and orderly in conducting their affairs, and diligent in claiming and collecting their dues.”³

“In an action upon the case in tort for a breach of a warranty of goods, the *scienter* need not be laid in the declaration, nor, if charged, would it be proved.”⁴ So in trover for taking and carrying away, it is not necessary, after having proved the taking and carrying away, to prove that defendant *knowingly* took and carried away—the law presumes that defendant knowingly took and carried away.⁵

Where, under a criminal statute, the offense was knowingly permitting or suffering faro or other banking games to be played,⁶ one Mount had been indicted, the court refused to charge the jury that if they believed, from the evidence, that the accused had rented the rooms in which the playing was done, to other persons without any knowledge or expectation that such games would be played therein, he was not responsible; and this ruling was sustained on appeal.⁷

§ 344. **Susceptibility of Use no Ground for Seizure.** Property, under the direction of the confiscation act of 1861, is limited to that which is knowingly used, sold, etc., by the owner or agent, for insurrectionary purposes. We must confine its meaning to this, by strict construction, since the spirit of the

¹ 1 Phillips on Ev. 823.

² Lane v. Shears, 1 Wend. 433; Cross v. United States, 1 Gallison, 28.

³ 1 Greenleaf Ev. § 38.

⁴ 1 Chitty on Pleading, 157.

⁵ See Commonwealth v. Drew, 3 Cushing, 279, on an indictment for “unlawfully suffering persons to resort,” etc.; to 11 B. Mon., Ky. Rep.,

for *knowingly* permitting,” etc. See, also, Commonwealth v. Stowell, 9 Met. 572; 12 U. S. Digest, 326; 1 Duer Ins. 520, 521.

⁶ Howard & Hutchinson's Stat. of Miss., § 68, p. 680.

⁷ Mount v. The State, 7 Smedes & Marsh, 277.

act is contrary to the general drift of international usage with regard to private enemy property. We ought not, therefore, to take the broad view that as all property owned by enemies strengthens them, it may therefore be said, in a sense, to be used, or at least, intended to be used for hostile purposes. The framers of the act evidently did not mean this; and, (what is of far greater importance,) did not express this. It does not logically follow that all property held by armed insurgents is confiscable from the premises that all is hostile property; for, as frequently heretofore observed, the sovereign has willed to take less than what he might have taken.

Susceptibility of hostile use, then, is no ground for "seizure and capture" under the direction of this act. Property may be of such a kind as greatly to strengthen the enemy if used, yet not be liable under this act. Cotton may have been very susceptible of use for insurrectionary purposes, during the late rebellion, but did that susceptibility render all cotton confiscable under the act? It has been twice so held;¹ but we suspect that such would not have been the conclusion, had the cases turned entirely upon this question. If susceptibility of use, and even the fact that a given species of property is of very frequent use for insurrectionary purposes, be good ground for condemnation under the direction of the act, why should proof be requisite, in any case, to the effect that an article of that species, constituting the *res* proceeded against, has been actually used for insurrectionary purposes, or "purchased or acquired, sold or given" for such purposes?

If cotton is always confiscable under the act of 1861, why not corn? Argument based upon the importance of either to aid insurrection might be excellent if addressed to the legislative department of the government.

¹ *Young v. United States*, (7 Otto.) 51 U. S. 423; *Anderson's Cotton*, 2 Wall. 404; Chase, 97 U. S. 59; Waite, C. J.; Mrs. Alex- C. J.

CHAPTER XXXVI.

THE INSURRECTION LAWS—CONTINUED.

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§ 345. **Forfeiture for Treason "Worked" by Proceedings In Personam.** Of the "Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July 17, 1862,¹ the first section is to punish treason by the indictment, arrest, trial and conviction of the traitor. The penalty is death, *or* imprisonment and fine. The fine is "not *less than* ten thousand dollars:" it may be many times more, as there is no limit above that sum. It may be inflicted, in any case, to such an amount as to take all the convicted traitor's estate.

The trial is by jury, so far as conviction is concerned; but the alternative penalty is at the discretion of the court. The person found guilty shall be hung, "or, at the discretion of the court, he shall be imprisoned for not less than five years and

¹ 12 Stat. L., 589.

fined not less than ten thousand dollars." This unlimited fine, (as well as imprisonment,) is resultant from conviction.

The working of this result is by the following proceedings: "Said fine shall be levied and collected on any or *all* of the property, real and personal, excluding slaves, of which the said person so convicted was the owner at the time of committing the said crime, any sale or conveyance to the contrary notwithstanding."

As a further result, worked by the conviction, the traitor is incapacitated for holding any office under the United States. (Sec. 3.)

Though one of the definitions of the words "to attain" is "to incapacitate," the incapacity resulting from conviction of treason under this act is limited, and falls short of the attainder resultant from convictions of treason under the law of England; but there can be no doubt that, under this act of Congress, (section 1,) the court may, upon any conviction of treason, make the fine so great as to take all the estate of the person convicted, which would be practically equivalent to the forfeiture of the whole estate, worked as the result of conviction for treason.¹

§ 346. **Constitutional Inhibition.** The Constitution limits the results of such conviction: "The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."²

This limitation is understood by some to confine the corrupting and the forfeiting so as to require those acts to be done only while the traitor is alive; but it is generally understood to restrict the forfeiture in amount; to limit it to the life-estate of the traitor—not affecting the title in fee. The courts seem to hold the latter view. Under this latter view, the clause quoted inhibits the working of the forfeiture of all the convicted traitor's estate by such proceedings following conviction as the levying upon all the property to collect a fine so gauged as to effect its forfeiture forever. For, Congress cannot do in-

¹ Post, § 359.

² Art. 3, Sec. 3, Clause 3.

directly what it is constitutionally forbidden to do directly. It can no more authorize the infliction of a fine for treason to an amount without any limit but the court's discretion, (so that all the estate of the traitor, real and personal—land *in fee* included—may be practically forfeited,) than it can enact that absolute forfeiture of land *in fee* shall be pronounced as a penalty resultant from conviction.

The first section of the act must therefore be understood to be qualified by the constitution; and, since all articles of that instrument may be considered as pervading and interlining all legislation, we may attach the clause quoted to this act, as a *proviso* forbidding the working of forfeiture for treason, except during the life of the traitor.

§ 347. **Post-mortem Forfeiting for Treason.** There seems reason for preferring the first mentioned view of this constitutional inhibition: that it forbids *post-mortem* forfeiting for treason. Such forfeiting had been common in England; and the framers of our organic law, seeing the abuses to which the practice there had led, not only prohibited attainting by bill, at any time, with its consequent forfeiture of estate, but also forbade that attainder as a penalty upon conviction should be reached by judicial commissions, or otherwise, after the death of the offender, so as to work forfeiture and corruption of blood. If article 3, section 3, clause 3, of the Constitution, may be fairly rendered by the substitution of *corrupting* and *forfeiting* for “corruption” and “forfeiture,” (since one of the definitions of “corruption” is *the act of corrupting*; and one of “forfeiture,” *the act of forfeiting*;) this view would seem to be plain. Certainly “corruption of blood,” in the article, does not mean the amount of corruption, nor the length of time in which the blood shall remain corrupted; and, it would seem as clear that “forfeiture” does not express the amount of forfeiture, nor the duration of the forfeiture. To construe “corruption of blood * * * during the life of the person attainted,” so as to make the phrase express the length of time in which the heirs of a traitor shall be incapacitated from inheriting, is to abuse language and make absurd the sentence from which we extract it. To construe “forfeiture * * * during the life of the

person attainted," so as to make the phrase express the length of time the heirs of a traitor shall be deprived of their inheritance, is to subject the construction to like criticism. Under such construction, as soon as the convicted traitor should be hanged, the corruption, forfeiture, and incapacity to inherit, would cease *ipso facto*, thus rendering the whole business of forfeiting and incapacitating exceedingly absurd.

If the constitution, by the clause under consideration, merely inhibits *post-mortem* forfeiting for treason, the first section of the act is relieved from its seeming unconstitutionality because of its provision for the working of forfeiture of all of the estate of the convicted traitor by fine covering it all, collected by proceedings after the trial in execution of the writ levying upon "all the estate real and personal."

Whichever view of the constitution may be correct, however, the fact remains that, under the operation of that section as it stands alone on the statute book, the convicted traitor's land may be indirectly forfeited *in fee*, by proceedings following conviction, in punishment for his crime. How this section is explained or affected by the "Joint Resolution Explanatory," promulgated as of even date with the act, we shall consider hereafter.¹

§ 348. **Further Criminal Provisions.** The second section of the act creates the new crime of inciting insurrection, etc., but the penalties of fine and imprisonment, following conviction, are expressly limited, and are therefore not subject to the foregoing criticisms upon the first. It is true that the fine may be made sufficiently large to take all the convict's property, as, indeed, any fine might prove sufficient—even one to the amount of a dollar, if the convict should be worth no more. But that is a very different matter, in principle, from giving the court an unlimited power of fining so that practical forfeiture might be purposely effected in every instance.

Persons inciting insurrection may be guilty of treason, or they may not; they may be foreigners owing no allegiance: in any case, they are not, under this section, prosecuted for treason,

¹ Post, §§ 358-365, 429-436.

but for a less crime—just as one guilty of murder might be tried for assault and battery with intent to kill.

The third and fourth sections complete the criminal provisions of this act; they finish all that is on the subject of the *punishment* of "treason and rebellion."¹

§ 349. **The Confiscation Sections.** The *confiscation* provisions are all embraced in the following four sections: the *fifth* to the *eighth* inclusive. They refer entirely to civil proceedings against enemy property. They come under that phrase of the title, thus expressed: "To seize and confiscate the property of rebels," as fitly as the first four under the caption: "To punish treason and rebellion," or the remaining six under that of "other purposes."

Now, all criminal terms are dropped. "Crime," "offense," "treason," "guilty," "convicted," "punished," "fine," "imprisonment," and "death," are no more mentioned; but civil terms of the law of nations are employed, such as "seizure," "enemy property," "condemnation," etc.

The first four sections authorize criminal proceedings *in personam*: the second four, civil proceedings *in rem*; the first four are for the punishment of *offenders*: the second four, for the confiscation of enemy property, as the Supreme Court has shown.²

It would seem that, upon a simple inspection of the text, no one could confound the action here authorized against hostile things with a criminal prosecution of persons. Whether we consider the object of the proceedings *in rem*, as it is distinctly stated; or the method of seizure and condemnation in conformity to admiralty and revenue laws, as it is clearly prescribed; or the sale by the government, in the capacity of owner after condemnation, with the "good and valid title" to be

¹ Post, § 350, note.

² *Miller v. United States*, 11 Wall. 298, 309: "It is impossible to read the entire act without observing a clear distinction between the first four sections, which look to the punishment of individual crime, and which were, therefore, enacted in

virtue of the sovereign power, and the subsequent sections, which have in view a state of public war, and which direct the seizure of the property of those who were in fact enemies, for the support of the armies of the country."

vested in the purchaser, as unambiguously set forth, it would seem impossible that the character of the proceedings could be misunderstood.

§ 350. **Direction for Procedure Against Hostile Property.**

The second part of the statute, (sections 5-8,) being a confiscation law, is merely directory and regulative. While the criminal law, in the first part, originates and creates, this confiscation law could not possibly be more than directory and regulative. It does nothing more than declare the will of the political department of the government that the executive should seize, and the judicial condemn, enemies' property, within certain limitations; it merely meets the requirement of the publicists and civilians that there must be such expression by the political power before the right to confiscate private enemies' property, seized on land, can be consonant with the law of nations. Besides, it prescribes, to some degree, methods of procedure, without departure, however, from established usages in courts of nations.

The first section of this law, (5th of the act,) divides confiscable property into seven classes, though it may be reduced to two general ones:

1. Property of official "confederate" enemies who continue such after the passage of the law; and

2. Property of other "confederate" enemies who continue such more than sixty days after public warning, (to be given by the President,) shall have been given.

After these dates, the property, (which had been enemies' property from the time its owners respectively first became enemies,) was to be seized by the President: "all the estate and property, moneys, stocks and credits of such person shall be liable to seizure;" (sec. 6.)

"To secure the condemnation and sale of any such property, after the same shall have been seized, * * * proceedings *in rem* shall be instituted, * * * and if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, * * * the same shall be condemned as enemies' property and become the property of the United States, and may be disposed of as the court shall decree,

and the proceeds thereof paid into the treasury of the United States." * * * (Sec. 7.)

Courts are empowered to make such "forms of decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshals where real estate shall be the subject of sale as shall fitly and efficiently effect the purposes of this act, and vest in the purchasers of such property, good and valid titles thereto." (Sec. 8.)

This confiscation law, (sec. 5-8, of the multifarious act,) is entirely free from ambiguity, and would seem to need no comment.¹

§ 351. **Limitation to Certain Classes of Property.** The purpose of the seizure of "all the estate and property, money, stocks, credits and effects" of the enumerated classes of enemies is declared to be the use of the proceeds for the support of the army, and to secure the speedy end of the war. In other words, the purpose is to strengthen the government and weaken the enemy. Ordinarily, this purpose would seem to be more generally attained by the seizure, condemnation and sale of all the property of all enemies, without specifying particular classes; but it must be borne in mind that the government was dealing with a great insurrection, and that it might have been thought that general confiscation would be unwise, as the most of the insurrectionists must ultimately be allowed to regain their citizenship. If the influential classes of the Confederate government could be "crippled in their resources," it might prove better to legislate to that end than to make general appli-

¹ *Miller v. United States*, 11 Wall. 308: "It is the act of 1862, the constitutionality of which has been principally assailed. That act had several purposes, as indicated in its title. As described, it was 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes.' The first four sections provided for the punishment of treason, inciting or engaging in rebellion or insurrection, or giving aid and com-

fort thereto. They are aimed at individual offenders, and they were undoubtedly an exercise of the sovereign, not the belligerent rights of the government. But when we come to the fifth and the following sections, we find another purpose avowed, not punishing treason and rebellion, as described in the title, but that other purpose, described in the title, as 'seizing and confiscating the property of rebels.'"

cation of one of the elective measures known to the law of nations.

Had they, (whether citizens or aliens,) abandoned their official positions, or confederate agencies, upon the passage of the act, their property, though confiscable by public law, could not have been proceeded against for want of authorization from Congress. Had the non-official enemies, described in sec. 6, returned to their allegiance within sixty days from the publishing of the proclamation required by the act, their property could not have been seized and condemned, for the like reason.¹

§ 352. **Action Taken After Warning Unheeded.** But, upon failure to give up Confederate positions, from the passage of the act, or failure to return to allegiance, as above stated, the property of any enemy thus brought under the statute authorization to seize and condemn, might be confiscated for having acquired the enemy character at any time; for the word "hereafter," occurring in the first, second, fourth, fifth and sixth clauses of the fifth section, does not mean that property shall be confiscated only for hostile positions held after the passage of the act, but it means that if the owners should hold or continue to hold such positions after the passage, then, in that case, it should be the duty of the President to cause the seizure of their property as enemies' property, without reference to the time its hostile *status* was acquired. In other words, if the insurgents should not heed the warning thus given, the stern rule of the law of nations should be applied to their property: thus the statute was a conditional authorization, on the part of the political power of the government, for the executive to seize and the judiciary to condemn, pursuant to public law.

§ 353. **Allegations Against the Property.** The libel of information must set forth the statute sufficiently; describe the property with absolute certainty, (especially if real estate,) and make the essential averment that it is enemy property, and that its owner is within one of the classes of enemies specified in the act. The name of the owner need not be stated in the

¹ President's Proclamation, 12 S. at L., 1266.

information.¹ Indeed, in many cases, it would be better pleading to omit it altogether. The published monition to follow the filing of the information might bring forward some unsuspected owner, or several contending owners, as claimants; and then, should the allegations fit them, the information would be better than though some other name had been inserted. The pleading would be good against the unexpected claimants, in either case, if they were among the classified enemies, but the simpler pleading would be preferable. Of course, in case of a claimant's appearance, and his joinder of issue, the government would be bound to prove the allegations that the property proceeded against had acquired its enemy status by reason of ownership, and would generally then be obliged to disclose the name of the owner; but, in case of judgment *pro confesso*, (which is likely to be the form of judgment, in time of war, in proceedings against the property of enemies) it would not be necessary to prove the owner's name. The fact that the thing belonged to an enemy as alleged, is sufficient. The name serves merely to describe the property proceeded against;² and a certain description, without the name, is quite sufficient. The insertion of the owner's name, in the information, might relieve him from being obliged to swear to his claim, in case of

¹ "In proceedings against real or personal property to obtain a decree of condemnation and forfeiture under the confiscation act, liability of the property seized to confiscation is alone the subject of inquiry. No judgment is possible against any person. The enactment of Congress was that property belonging to any one embraced within several classes of persons should be subject to seizure and condemnation. Persons were referred to only to identify the property. Not all enemies' property was made confiscable; only such as was designated by the act, and reference to the ownership was the mode selected for designating that which was made liable to confiscation. If

the property belonged to a person who had filled either of the offices specified, or who had done any of the acts mentioned in the fifth, sixth, or seventh articles of the information, it was the property which the act had in view. The United States had, therefore, only to aver and prove that the lots and squares seized belonged to some one who was one or another of the persons referred to in the fifth or sixth sections of the act of Congress. In either alternative the property was made subject to confiscation." *The Confiscation Cases*, 20 Wall. 104, 105.

² *The Confiscation Cases*, (composed of *Slidell's Land and Conrad's Lots*), 20 Wall. 105.

his appearance, but would not exempt him from stipulation for costs, as in all such cases. He appears as plaintiff; he is a claimant, and the *onus* of proof of ownership is consequently upon him, except so far as the information has relieved him by its allegations against the thing which he claims.

The non-appearance of the owner cannot affect the proceedings, as they are strictly *in rem*. The monition is notice to all persons, and all are concluded by judgment against the thing. The insertion of the wrong name in the information would not avail the real owner who should stand silent and allow default to be entered. No proceedings *in rem* would be of any utility were not this well settled rule regarded.¹ If the *res* has been otherwise described with certainty—the metes and bounds of a lot, and its number, by some given legal plan,) the name ceases to be important as a matter of description. We are warranted in deducing these views of the form of proceeding not only by the clause requiring conformity to “admiralty and revenue proceedings,” but also by the reflection that otherwise the whole statute would be likely to prove inoperative with regard to its purpose of supporting the army.

§ 354. **Allegations Respecting the Enemy-Owner.** The necessary allegation that the owner occupied an official position such as is named in the act, or that he refused to return to his allegiance within the given time after proclamation, must be positively made; but the subsidiary allegations descriptive of the different positions, (any one of which classifies him among those whose property is to be proceeded against,) may be made in the alternative, so far as the different subdivisions of each clause of Section 5 are concerned. Any one of them, being true, justifies condemnation of the property.² But the different clauses should be kept distinct, since the third is not retroactive if the resolution “explanatory”³ of the act could be considered amendatory, or a proviso, as has been contended.

Absolute accuracy as to the day and place and specification of a particular act done in proof of the enemy character, as in

¹ Ante, Chapter x, and authorities there cited.

² Ante, § 61.

³ 12 Stat. at L., 627.

criminal indictment, is not only not required under the confiscation sections, but such particularity would result in failure to carry out the purposes of the act in almost every case. It would be almost impossible to obtain such accurate information, in time of war, when the enemy-owners of the property proceeded against are within a territory bounded by bayonets. But, were such particularity practicable, it is never required in civil proceedings against things.¹

The real owner must heed the monition and claim in time. He would be too late after the court had solemnly found the facts as stated in the libel, and decreed condemnation, and thus ratified the proceedings so as to bring them strictly under the statute and within the expressed intent of the legislator.²

If the property, "whether real or personal, shall be *found* to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemies' property³ and become the property of the United States."⁴ When the court has so *found*, and decreed condemnation, the doom of the property is sealed. This is strictly in conformity with the rule in all proceedings *in rem*.

§ 355. **Condemnation.** The effect of such condemnation and judgment is to transfer the thing thus adjudged from the former owner and to vest a new title to it in the government, whether the thing be a chattel or land.⁵ The statute makes no distinction. The courts can make none. A more clearly written, unequivocal, direct expression of legislative will could hardly be found in the statute books of the country, for courts to enforce.

It will be found, by reference to the decisions of the Supreme

¹ Ante, § 61, et seq.

² *Semmes v. United States*, 1 Otto, 21.

³ "It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is that right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confis-

cation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent—a relation in which it has been brought in consequence of its ownership." *Miller v. United States*, 11 Wall. 305.

⁴ 12 Stat. at L., 591, § 7.

⁵ Chap. xv.

Court in cases arising under the confiscation sections of the act, that it has been held that the transfer of the *res* to the government is complete. Not only personal property, but real estate is so transferred in its entirety—its absolute full ownership. “All the right, title and interest” of a given enemy is so transferred, (or rather a new title) when that is the thing libeled and condemned. The real estate is transferred, (if that is the *res*, described accurately, and charged as enemy property,) and becomes the real estate of the government. Either a lot of ground, or interest in a lot, may be the *thing* proceeded against, and transferred, by the act of forfeiting, from the owner of a usufructuary interest, or from the absolute owner, as the case may be, to the government. The United States becomes just as fully the owner as though they had acquired by an act of sale, or donation, or devise, or any other act by which property may be acquired. And they may hold such property forever; erect, upon lands so acquired, forts or public buildings; or convey by grant, so far as concerns the former owner. But, the object of the confiscation being the application of the proceeds to the army, to speedily suppress the rebellion existing at the time of the passage of the act, Congress thought proper to provide that all such property should be sold, and its “proceeds paid into the treasury of the United States for the purposes aforesaid.”

The proposition seems beyond controversy that the statute provides for the absolute confiscation of enemy property, real and personal, and the lodging of the complete ownership of it, in the United States; and that the condemnation of all such property fully vests new title in the United States.

The Supreme Court have decided that from the date of condemnation, the *fee* is “either in the United States or the purchaser:”¹ *ergo*, in the United States for the time between condemnation and sale.

¹ Wallach v. Van Riswick, 2 Otto, (92 U. S.) 202. This was re-affirmed in Chaffraix v. Shiff, Id. 214, and in Pike v. Wassel, 4 Otto, (94 U. S.) 711, and in French v. Wade, 12 Otto, (103

U. S.) 132. In Wallach v. Van Riswick, speaking of the confiscation cases of United States v. Land of French Forrest, and United States v. Two Squares of Ground, property of

§ 356. **The Sale of the Title in fee, or of Whatever is Condemned.** The plain and unequivocal enactments in the statute, that the property, if "found to have belonged to a person engaged in rebellion, or who has given aid and comfort thereto, the same shall be condemned as enemies' property and become the property of the United States, and may be disposed of as the court shall decree, and the proceeds thereof paid into the treasury of the United States for the purpose aforesaid," the support of the army; and that the courts "shall have power to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshals thereof where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of this act and vest in the purchasers of such property good and valid titles thereto," are too simple, clear and perspicuous to need any comment in this place.¹

This statute requirement that whatever enemy property is thus condemned must be sold by the new owner, (the government,) has been modified in a slight particular. It was provided in the act establishing the Freedmen's Bureau,² that confiscated tracts of land might be set apart for the use of freedmen and loyal refugees, subdivided into forty-acre lots, rented for three years, and then be sold to the occupants respectively, not at auction, but at an appraised value, at private sale. This, being a later expression from Congress than that of the act of July 17, 1862, or any contemporaneous legislation, shows that the legislator understood that land itself was acquired by con-

J. P. Benjamin, which had been collaterally attacked by ejectment suits brought against the purchasers of the condemned property, the Supreme Court said: "It is true that in *Bigelow v. Forrest*, 9 Wall. 339, and *Day v. Micou*, 18 Wall. 156, some expressions were used indicating an opinion that what was sold under the confiscation acts was a life estate carved out of a fee. The language was, perhaps, incautiously used. *We certainly did not intend to hold that*

there was anything left in the person whose estate was confiscated." Both Forrest's land and Benjamin's square were seized, libeled and condemned, sold and title given, *in fee*; and, if nothing was left in either enemy owner, the *fee* was not left to be transmitted to heirs.

¹ Post, Chap. xl.

² Act of March 3, 1865, 13 Stat. at L. 507; *Titus v. United States*, 20 Wall. 477.

fiscation, and not merely the life interest in the land, or tenancy during the life of the late enemy owner.

§ 357. **No Constitutional Inhibition.** The confiscation sections of the act of 1862, with regard to the condemnation and sale of all enemy property, including land *in fee*, are entirely free from the restriction of the Constitution, art. 3, sec. 3, clause 3. That restriction is confined to proceedings *in personam* for treason, and cannot possibly affect proceedings *in rem* in vindication of the government's *jus in re*. by reason of the enemy ownership of the things proceeded against. True, the owners may be traitors; but "they are none the less enemies because they are traitors."¹ Many prizes were confiscated as enemy property during the rebellion, because of their ownership by enemies who were, at the same time, citizens. Of the one hundred and fifty prize cases in New Orleans during the war, and the large number in New York, at Key West, and elsewhere, many were owned by citizen enemies. And the Supreme Court have said that the confiscation act of 1862 "was designed to introduce the principle of confiscating enemy property seized on land, like that seized on water;" and it prescribed, they add, that "the proceeding should be, in its essential features, analogous to those which the courts of admiralty were accustomed to use in property captured at sea."²

Now, the forfeiture restricted by the Constitution, art. 3, sec. 3, clause 3, is not confined to real estate: therefore it is as applicable to the confiscation of vessels owned by citizen enemies, as to land so owned. If only the life estate of a fee-simple title owner can be condemned and sold, only the life interest of a ship owned by a domestic enemy could be confiscated as prize of war. No one would contend that prize condemnations and sales are limited by the Constitution.

So, also, confiscations and sales of citizen enemies' property, under the non-intercourse acts, and under the confiscation act of 1861, would just as plausibly be restricted by the clause mentioned.

¹ The *Amy Warwick* et al. 2 Black. 636.

Tyler v. Defrees, 11 Wall. 331.

It may be with certainty concluded that there is no inhibition to the confiscation and sale of land *in fee* under the act of 1862, to be found in the Constitution.¹

§ 358. **The Explanatory Resolution.** It has been thought, however, that the expression of art. 3, sec. 3, clause 3 of the Constitution, in the closing lines of an explanation by Congress, has the effect of such inhibition. The title of this explanation is: "Joint Resolution Explanatory of 'An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for other purposes.'"²

The inhibition is supposed to be couched in the following, which are the concluding lines of the resolution: "Nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

This legislative expression was made to satisfy the President that the Constitution was not infringed by the act, as appears by his message returning both to Congress with his signature, and by the debates in Congress.

Reference to that message will show that it was the forfeiture worked by personal conviction of treason which concerned the President; and the debate shows that the difficulty lay in the first four or criminal sections of the act.

§ 359. **The Meaning Shown from the Debates.** Prior to the President's expression of his scruples, the joint resolution closed where the above quoted clause of it begins. That clause was afterwards added as an amendment to the resolution. Sen-

¹ "All the classes of persons described in the fifth and sixth sections of the act of 1862 were enemies within the laws and usages of war."

"If it be true that all the persons described in the fifth, sixth and seventh sections were enemies, as we have endeavored to show they were, it cannot matter by what name they were called or how they were described. The express declaration of the seventh section was that their property should be condemned 'as

enemies' property,' and become the property of the United States, to be disposed of as the court should decree, the proceeds being paid into the treasury for the purposes described, to wit: the support of the army. It was, therefore, as enemies' property, and not as that of offenders against municipal law, that the statute directed its confiscation."—*Miller v. United States*, 11 Wall. 313

² 12 Stat. at L. 627.

ator Clarke, in offering it, said: "I present the amendment to meet what I believe to be the objection of the President."¹

"*Mr. Trumbull.*—This bill, however, as I understand it, does not provide for trying men for treason and forfeiting their property on their conviction for treason. There is no such principle in the bill. It does not change the punishment for treason, and it contains, if I recollect rightly, a provision in the first section authorizing the assessment of a fine. I believe that is retained.

"*Mr. Clarke.*—That is retained.

"*Mr. Trumbull.*—And that fine could be levied, I suppose, upon the real estate, and the real estate sold under that fine?

"*Mr. Clarke.*—The bill so says.

"*Mr. Trumbull.*—I would have preferred that that should have been out of the bill; but there is not in the whole bill, as I understand it—and I wish not to misunderstand it—any other clause, excepting that first section, forfeiting the real estate of a man who is tried for treason. Am I not right?

"*Mr. Clarke.*—That is right.

"*Mr. Trumbull.*—Then why talk about this bill forfeiting the real estate beyond the life of the traitor? It is not in the bill, except it is in that first clause, that you shall get at the real estate by means of a fine. * * * As I understand it, there is not now in the bill any provision for forfeiting the property of a traitor beyond his life, or for any time, except as it will grow out of that first section. The other provisions of the bill for seizing property relate to property that is captured by the army where the person of its owner is not subjected to trial for treason or any other offenses."²

§ 360. **The Reference is to Treason Trials.** It was the last clause of the resolution that was meant to relieve the act from any scruples with regard to its violation of art. 3, sec. 3, clause 3, of the Constitution. But, since this closing part of the resolution has been held to be equivalent to the constitutional clause, what additional force could have been gained by expressing a sentence of the Constitution in a resolution?

¹ Cong. Globe, Part iv., 37 Cong.,

² Id. 3080, 3081.

2 Sess., p. 3380.

It is not so broad as the constitutional clause, since it is confined to real estate; and, with regard to that, it attempts nothing more than to explain to the courts how to construe "any punishment or proceedings."

So far as it goes, however, in following art. 3, it is like it in this important particular: confinement to the *working of forfeiture* by personal, criminal *proceedings* in *punishment* of an *offender*: therefore, it refers only to the first four sections of the "Act to Suppress Insurrection," etc., which concern crimes and offenses; and not possibly to the second four, which concern enemy property and its confiscation by the *actio in rem*.

§ 361. **The Resolution Refers to the Working of Forfeiture to "Punish" "Offenders."** It refers to "working forfeiture:" and we have shown that a court's unlimited power of fining convicts for treason might always be made to "work" practical forfeiture, while there is no such provision in the confiscation sections. Nothing is *worked* by the decree of condemnation and sale; no legal consequences flow beyond these acts complete in themselves.

It refers to "punishment:" and we have shown that the criminal sections were "to punish treason," in part by fine, unlimited by the act, to be collected by proceedings, after the trial, levying upon "any or *all* of the property, real and personal, excluding slaves, of which the said *person* so convicted, was the owner at the time of committing the said *crime*." But the element of "punishment" does not enter into actions *in rem*, against hostile property, since, (as heretofore established,) such actions are of civil character, and are not to punish any one.¹

It refers to an "offender:" and thus it points unmistakably to the criminal sections where equivalent terms are used,² as in sec. 1: "Every person who shall hereafter commit the crime of

¹ Chap. ii., and the authorities there cited.

² When a word or clause is found repeatedly used in a statute, it will be presumed to bear the same meaning throughout, unless there is some-

thing to show that another meaning is intended. *Berryman v. Perkins*, 55 Cal. 483. This is, indeed, a general rule of interpretation, used in decyphering old manuscripts, as well as in legal construction.

treason," etc.; in sec. 2: "Such person shall be punished," etc.; in sec. 3: "Every person guilty of either of the *offenses*," etc.; and in sec. 4: "The prosecution, conviction or punishment of any person or persons guilty of treason," etc. On the other hand, the term "offender" is utterly inapplicable to the confiscation sections, (5th, 6th, 7th and 8th,) or to the remaining six on "other purposes."

§ 362. The Resolution Refers to Criminal Proceedings Only.

It refers to "proceedings," it is true, but qualifies the term so as to confine it to the criminal proceedings authorized under the first four sections, by the additional words "work a forfeiture;" so it is proceedings working forfeiture which is mentioned in the resolution—such as we find in the levying of a fine which may be so purposely gauged by the court as to take all of the real estate in fee forever in consequence of a conviction of a person for treason. The qualification shows unmistakably that the "proceedings" mentioned in the confiscation sections was not meant, since that term, as used in the latter, is qualified by the words "*in rem*;" and further qualified in the requirement as follows: "*such* proceedings shall conform, as nearly as may be, to proceedings in admiralty and revenue cases," all of which proceedings "work" no consequential forfeiture whatever. Besides, the proceedings *in rem* must be instituted, as required by sec. 7, in the United States District Courts, which have no jurisdiction over criminal proceedings; while the proceedings *in personam* under the criminal sections, must be in the Circuit Courts, which have criminal jurisdiction.

§ 363. The Restriction Refers to Only that Part of the Act to Which it is Applicable. It refers to the "act," it is true; but, since the preceding part of the resolution expressly refers to "the third clause of the fifth section," (which is one of the confiscation sections,) there is significance in the broader reference in the closing sentence. The legislative expositor would have kept his field, had he not contemplated something beyond it. Doubtless the reference to the act is broad enough to cover "punishment," "offender," "proceedings" and "working forfeiture," wherever those terms are found anywhere in the act, provided there is adaptability. But this reference to "the act"

must be fitted on where it will fit. Certainly it cannot be attached to the last six sections without incongruity. Certainly there is equal incongruity between it and the "proceedings *in rem*, against enemies' property," similar to admiralty and revenue proceedings. But the fit is perfect when we apply the restriction to the criminal proceedings for working the forfeiture of all an offender's real estate in punishment for his offense, by levying a sufficient fine: so here we find the only part of "the act," to which the restriction has any applicability.

§ 364. **It is Not an Amendment to the Act.** The resolution purports to be "explanatory" of the act; not amendatory. By its title, it is a mere congressional explanation—not a *proviso*—not a law. By its text, it merely explains how portions of the act should, in the opinion of Congress, be construed; it is no arrogant edict from the legislative department of the government to the judicial department, commanding the construction of a statute in a given way.

A law might be passed under the form of a joint resolution, with a proper enacting clause. There is nothing sacramental in the words "Be it enacted;" for "Be it ordained" would answer as well. But something must really be enacted in order to constitute a law. Here nothing is enacted. A statute, after its passage by both houses of Congress, is, by a subsequent resolution, explained to the President and to the courts; but nothing whatever is "enacted." The signature of the President could not convert a "resolution explanatory" to an act amendatory, though signed at even date with the act.

If, when there is really an enactment, the phrase "shall be construed as not to apply" may sometimes be understood as equivalent to "shall not apply;" and thus may be relieved of any charge of assumption of judicial powers by Congress, yet all such expressions, in solemn legislative acts, ought to be avoided by the legislative department because of their trend towards the violation of the articles of the Constitution distributing the powers; and, with jealous care, the judiciary should repel such offensive encroachments on the one hand, while guarding against all temptation to judicial legislation, on the other.

When, however, there is no enactment, and no attempt to enact, but a resolution adopted expressly for the sole purpose of saying how a certain statute "shall be construed," there would seem to be no justification for treating it as a statutory amendment.

§ 365. **It Cannot be Invoked to Explain the Intentions of the Legislator when the Act was Passed.** May not the "Joint Resolution Explanatory of 'An Act,' " etc., be invoked to ascertain the intention of the legislator?

No. It cannot, for the following reasons:

(1.) There is no ambiguity in the act to be explained; certainly none in the confiscation sections, as the Supreme Court have said.¹

(2.) If there were ambiguity, we must look to the debates *at the time* of its passage; not to subsequent explanations by Congress.²

(3.) Though contiguous legislation may be sometimes invoked to explain ambiguity, this "resolution explanatory" is not such legislation, since it is not legislation of any kind.

(4.) Subsequent legislation on the same subject matter as the act, and with direct reference to it,³ shows that Congress understood the four confiscation sections as expressed in the text of the statute.

Without comment upon these four suggestions, (which need none, it would seem,) it may be remarked, finally, that if the explanation were really an amendment—were really a law—were a *proviso*, (as it has been called,) it would still be without applicability to the confiscation sections, except in depriving confiscations under the third clause of the fifth section of their retroactive character under the general law of relation.⁴

¹ "If, therefore, the question before us were to be answered in view of the proper construction of the act of July 17, 1862, *alone*, there could be no doubt that the seizure, condemnation and sale of Charles S. Wallach's estate in the lot in controversy, left in him no estate or interest." *Wallach v. Van Riswick*, (2 Otto,) 92 U. S. 202.

² Ante, § 359.

³ "Act to Protect Liens on Vessels and for other purposes," approved Mar. 3, 1863, 12 Stat. at L. 762, U. S. Rev. Stat., §5322; Freedmen's Bureau Act, approved Mar. 3, 1865, 13 Stat. at L. 507.

⁴ For inapplicability of the resolution to *sales* of condemned property, see *post* 429-436.

CHAPTER XXXVII.

CONFLICTING DECISIONS.

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§ 366. **Hostile With Guilty Property Confounded.** In the construction of the confiscation sections of the act of 1862, by the court of highest resort, if there is found some conflict of opinion, it is perhaps assignable to the fact that the statute contains both a criminal law and a law for civil procedure against enemy property; and to the further fact that the distinction between guilty and hostile property seems to have been overlooked.

There can be no impropriety in setting forth cases, in the order of their deliverance, which bear upon the construction of the act and the legislative explanation of it.

First, it was held¹ that land had been condemned and sold,

¹ *Bigelow v. Forrest*, 9 Wall. 339: Strong, J.

under the act, for an offense committed by its enemy owner, though it had not been used as an instrument in the commission of the offense. While it was held that the proceedings had been *in rem*, against all the right, title and interest of French Forrest, who was the owner in *fee*; and that the land was found (by the court which had condemned it as enemy's property,) to have belonged to a person engaged in the rebellion, yet it was also held that the condemnation was not rightfully that of the *res* but only of the use of it while French Forrest might live. Though the United States District Court had had jurisdiction of the subject matter; though all persons had notice, and no one claimed and all were defaulted; though that court had found the necessary fact that the land, prior to seizure and condemnation, had belonged to one of that class of enemies whose property was rendered confiscable; yet the Supreme Court sustained the collateral attack made upon this decree by Douglass Forrest, son of the enemy, as his heir, after his death, because (they held) French Forrest was an "offender,"—not an enemy; his property *guilty*, not *hostile*; the proceedings under municipal law—not under the *jus gentium*; the object of the law, *punishment*—not the weakening of the foe. All this is either expressed in the opinion or necessarily implied.¹

§ 367. **The Res held Shorn by the Explanatory Resolution.** They held that the explanation given of the whole act of 1862 by Congress in a resolution passed with it, was of the force of a *proviso* attached thereto, and that it limited this decree of the court below to the condemnation of the father's life estate in the *res*. Had the land been really condemned under some municipal law for guilty use by an offending owner, it would not have "worked" forfeiture, as the explanatory resolution has it.

The provision of the act was that the proceedings should be *in rem*, and the property condemned as *enemy's* property, and sold; and complete title given to the purchaser.

The distinction drawn in the opinion, between the right, title and interest in land, and the land itself, ceases to exist the

¹ Ante, chap. ii., civil character of all proceedings *in rem*.

moment it is admitted that Forrest, the father, held by a *fee simple* title. The land was the subject of seizure; but had "the right, title and interest" been the subject of seizure, the condemnation would have carried the land, where the interest was the whole, and the title *in fee*. This principle is well settled.¹

This decision tends to overturn the long established rules of notice, of claim and answer, of default, and of *res judicata*, in all suits *in rem*. Douglass Forrest had received notice by monition, but had made no claim, entered into no stipulation, filed no answer, suffered himself to be defaulted, allowed the final adjudication of the land, (which was binding on all the world,) to be consummated, stood by and let the land be sold in market overt, had seen it become the property of Bigelow, and then he brought an action of ejectment against Bigelow for the recovery of the land, and succeeded.

§ 368. **Proceedings In Rem held Personal.** It was pleaded in bar, (or agreed by counsel,) as authorized by the confiscation act, that Douglass Forrest himself had been such a confederate officer as is classified with those whose property was declared by the act to be confiscable as enemy property: yet the court said, "Was he therefore barred from maintaining the ejectment? The land was not seized or condemned *for any act of his*," implying that it was seized or condemned for some *act*, when it was for ownership by an enemy of a designated class, who never had *used* his farm in the perpetration of any *act*. "He had no interest in it when it was declared forfeited:" certainly a very good reason for not appearing, claiming, affirmatively prosecuting his rights, and defending for the defendant thing; certainly a very good reason for allowing himself to be defaulted along with all the rest of the world, and for letting the new title arise in the United States to be conveyed to the purchaser. "He could not have been heard in opposition to the decree of forfeiture:" certainly not, since he had no interest; and for the further reason, that an enemy has no standing in the courts of the opposite belligerent. "The proceeding was wholly *inter*

¹ Chap. iv., §§ 40, 41.

alias partes:” The United States was the libellant and the *res* was the defendant; and there were no other parties but “all the world,” and all were defaulted. French Forrest was no more a party than Douglass was. “If, therefore,” continue the court, speaking of Douglass, “he is not at liberty to assert his claim”—What claim? He had no interest. If he had had, he should have claimed in time—should have claimed before the only tribunal having jurisdiction over the subject matter, in response to the notice, anterior to the decree. “If, therefore, he is not at liberty to assert his claim, he is denied the right to his property without trial, without any procedure in due course of law, and the practical effect of the bar is to assure to the purchaser at the marshal’s sale the enjoyment of the property after his right has expired;” * * * which is to say that if a court having jurisdiction finds the *res* to be enemy property of the confiscable class, it is essential to find who the particular owner is, which would be going beyond the requirements of the law; that if such court has judicially found the hostile *res* of the proscribed class to have belonged to the enemy A., when in fact it belonged to the enemy B., the latter may stand silent, and then attack the decree collaterally after the war. Douglass Forrest was barred as all enemies, in all suits *in rem* against hostile property, are forever barred; the plea in bar, authorized by the act of 1862, § 6,¹ makes no hardship, since it merely applies a principle long held just—a rule many hundreds of years old. If Douglass Forrest had an interest and could not claim it because he was an enemy without the *entre* of the courts, the confiscation of his property was no more “without due process of law” than is that of every enemy’s property, be it prize ship or hostile land, which is condemned by suit *in rem*. Is the condemnation without trial? There was trial of the *res*; not personal trial. And such trial of the *res* is due process of law.²

§ 369. **Treated as a Trial for Treason.** But the court means that if he is barred from bringing his action of ejectment

¹ 12 Stat. at L. 591.

² Ante, §§ 22, 23.

against Bigelow, he would be deprived of rights arising upon the death of his father.

They say, "The act and the contemporaneous resolution must be construed together. The latter declares that the act shall not be construed to work a forfeiture of the real estate of the offender beyond his natural life. It can do this neither directly nor indirectly. The punishment inflicted upon him is not to descend to his children. His heritable blood is not corrupted." It is so apparent here that criminal trials for treason were in view, that it is not necessary to say anything more than that the misapplication of the resolution to the confiscation sections, instead of the criminal ones of the act to which alone it is applicable if applicable at all,¹ is the reason of all these expressions about "heritable blood," "punishment inflicted," "forfeiture of the real estate of the offender," "work a forfeiture," and other criminal terms, when treating of the civil *actio in rem* against *enemy* property.

The court did "not care to speculate upon the anomalies presented by the forfeiture of lands of which the offender was seized in fee, during his life and no longer, without any corruption of his heritable blood; or to inquire how, in such case, descent can be cast upon his heir, notwithstanding he had no seizin at his death." It may be remarked, *en passant*, that it is never absolutely necessary that one should have the possession of property at the time of death, in order that his heirs may inherit from him, but the essential thing is that he *own* it at that time. It seems to be not a question of *seizin* but of right.

§ 370. **Pleadings Misconceived.** The case of "*The United States v. All the right, title and interest of William McVeigh, in and to all that certain parcel of land,*" etc., tried strictly as an *actio in rem*, against a *hostile* thing, in a United States District Court, in Virginia, was taken to the Supreme Court by McVeigh,² who had been denied standing as claimant in the District Court because of his enemy character.

The Supreme Court treated the case throughout as though it

¹ Ante, §§ 358-365.

² *McVeigh v. The United States*, 11 Wall. 259: Swayne, J.

were a personal, penal action against McVeigh, as a citizen, to have a forfeiture decreed against him for offensive acts committed by him against the United States, but without using the land as an instrument. They speak of his "criminality," his "guilt," his "offenses." They speak of him throughout as the defendant in an action *in personam*; say that "if assailed" he "could defend;" cite cases bearing only on the rights of defendants in personal actions, civil or criminal; and so far do they go against the long settled doctrine relative to enemies' want of standing in the courts of the opposite belligerent, as to say that even if McVeigh had been an alien enemy, he should have been allowed to appear as claimant.¹

The conclusions reached seem entirely based upon a misconception of the pleadings in the case. The pleadings showed no suit against McVeigh. He was not seeking to appear as defendant, but as plaintiff—for the claimant is always a plaintiff. Had he thrown off his enemy character, he ought to have been allowed *locus standi* in the forum. He then could have filed his claim, without making proof of it *quoad* the libellants since they had alleged the defendant thing to be his. Then he might have defended that thing.² The only advantage to him of the descriptive part of the libel which described the land as his, was relief from the necessity of proving his claim³ Yet, the justices said that this case of *The United States v. All the Right, etc.*, of McVeigh to the land, was "wholly unlike a proceeding purely *in rem*, where no claimant is named, and none appears until after the final decree or judgment is entered, and the case has terminated."

A case is not any more "purely" *in rem* when it is against smuggled silk as a *guilty* thing described as belonging to "some person unknown," than if described as belonging to a named proprietor; nor when it is against a ship as an *indebted* thing, (to enforce the seaman's wages lien, for instance,) described as belonging to persons unknown, than when captain and owners are specified by name in the pleadings, by way of describing

¹ Ante, Chap. xxxiv.

³ Id., § 77.

² Ante, Chap. viii.

and identifying the vessel; nor is it any more "purely" *in rem* when against *hostile* things if the owner's name is omitted than if it is expressed. It must be further remarked, in this place, in loyalty to the general subject under treatment, that it is not essential to the purity of suits against things that no claimant should appear "until after the final decree or judgment is entered, and the case has terminated." Claimants, at that late stage, could do nothing to defend the *res* against condemnation; they would be too late to ask for the restoration of the *res* to themselves. The case in which they properly come in after the decree of condemnation is where they have no interest to oppose condemnation, but have a lien or privilege upon the proceeds.¹

§ 371. **Judicial Standing.** *Miller v. The United States*² came up from Michigan, and was originally *The United States v. Railroad Stock of Samuel Miller*. The libel showed that the stock was of that class of enemy property which Congress had declared confiscable, since Miller was alleged to be an enemy owner among the designated sort of rebels whose property should be attacked *in rem* as authorized by the sections on hostile property found in the act of 1862.

Miller never appeared till after the condemnation and sale of the *res* though notified in due time, along with all the rest of the world. Now he asked, by petition, that the decree might be opened and set aside. Defeated in his application, both in the District and the Circuit Court, he found no relief in the tribunal of last resort. His right to appear, however, "is set at rest by the decision made in *McVeigh v. United States*, a case decided at this term," said the Supreme Court. This was going far beyond the *McVeigh* case, as to the *locus standi* of enemies in the forum of the opposite belligerent; for, in that case, the enemy came in time, in response to the monition, before general default had been entered; while, in this, Miller came not only as an enemy but a defaulted party, with no more right to molest a decree which was *res judicata* than any other man in the world had. The cessation of hostilities had not given him

¹ Ante, §§ 79, 80.

² *Miller v. The United States*, 11 Wall. 292: Strong, J.

right to remove the case by writ of error, as a defaulted enemy owner, though now he could have standing, in his citizen capacity, in the courts of the country for other purposes. McVeigh's case is the only precedent cited on the point of Miller's right of appearance, and it does not go far enough to support it.

Though the judges had thought the suit *versus* McVeigh's land was "wholly unlike a proceeding purely *in rem*," they state that this one, *versus* bank stock, is "in the nature of a proceeding *in rem*." Why it is not simply *in rem*, there is no suggestion.

Here *McVeigh* and *Miller* part company. Throughout the rest of Miller's case, the reasoning and conclusions of the court are as different from those in McVeigh's as one can well conceive.

§ 372. **Seizure Gives Civil Jurisdiction.** First, the subject of seizure. It is held that seizure is undoubtedly necessary to confer jurisdiction over the *res*; that if the *res* is not susceptible of actual manucaption, it may be constructively arrested by notice to the person controlling it; that if there be no statute in a given State, prescribing the method of seizing stocks and like intangible things, the Federal Court, having jurisdiction, might make effective orders; that notice to the presiding officer of a railroad that certain stocks of the road belonging to Miller were seized, was a sufficient arrest of the *res*; that there was no necessity of a second seizure by the marshal, in obedience to the judicial warrant issued after the libel had been filed, since he had seized before the filing, and he still held the thing proceeded against; that the judicial warrant was for the purpose of bringing the *res* under the control of the court as well as to give notice to the world; that the return of the marshal, stating that he held the *res*, was sufficient. This is all very strongly put in the opinion of the majority of the court; and it is entirely in opposition to the views previously held that the suits against the property to be seized under the act of 1862, were of a penal and personal character; and we cannot help adding that the principle that seizure and publication are notice to all the world ought logically to have

cut off the non-appearing and defaulted Miller, and to have kept this case beyond the precincts of the Supreme Court.¹

§ 373. **The Default and Finding.** The default of all persons was held to be regular; and the final decree, the court said, must be presumed to have been based upon the previous finding of the essential fact against the *res*; that is, the fact which created the *jus in re*—(the fact that the *res* was hostile property.²) This was held to be not a jurisdictional fact; and to be therefore one that must be assumed as proved, when a decree which depends upon such a fact as a basis, has been rendered by a court having competent jurisdiction, and jurisdiction over the subject matter.

There is some confusion, in the majority opinion, on the subject of the default and the final decree, in actions against enemy property. It is argued that since, under the revenue act for forfeiting fishing vessels for contravention of the statute relative to fishing bounties, the court is required to determine the cause after the default;³ and since in admiralty proceedings the act of 1789 requires a hearing after default, there is no need of a hearing after default in a suit against enemy property prosecuted under the act of 1862 for the reason that the act does not require it. What is the object of the usual judicial order that the allegations of the libel be taken *pro confesso* and the default of all persons entered? It is to give judgment against all persons not claiming. What is the object of the final hearing and decree? It is to give judgment, contradictorily with those who have not confessed, (but who, on the contrary, have claimed the thing, or some right in it,) if the evidence be sufficient to establish the libellant's *jus in re*, declaring the *status* of the *res*; *id est*, whether it was forfeited when the fact creating the *jus in re* took place; or, (if not against a *guilty* but against a hostile thing,) whether it has acquired the enemy character so as to warrant the judgment of confiscation. Let it be borne in mind that forfeiture is not the work of the gov-

¹ For Seizure, see Chap. v. and authorities there cited. For Effect of Notice and Default, Chaps. vii. and x; §§ 66, 68, 98.

² Chap. xxix., §§ 257-263.

³ *United States v. The Lion*, 1 Sprague, 339.

ernment, but that confiscation is. The owner of property may forfeit it, but he never confiscates it. In suits *in rem* against guilty property, the court finds that the property has been forfeited by somebody; in such suits against hostile property, the court decrees, because it is found to be enemy property, that it shall be confiscated.

From the very nature of all proceedings *in rem*, therefore, there is something more to be done than simply entering the default of all for non-appearance, since that is not a decree against the *res*, but is virtually a personal decree; and the majority of the court seem to have inadvertently overlooked this vital fact when they said that there need be no hearing after default unless required by statute.¹

§ 374. **The Hearing.** The hearing, where there is no claimant, is complete, (if the essential averments have been made in the information or libel,) when the confessed allegations have been offered and received in evidence against the thing; for, when everybody in the world has confessed and is estopped, there remains no one to complain; and the court pronounces the decree that fixes the *status* of the thing. In case of a *hostile* thing, the only object of the notice is to ascertain whether friends have any claim to urge against the condemnation. When they have been defaulted, no one else could have any rights in our courts, even if enemies were not really included in the general defaulting of "all persons."

The majority of the justices, after referring to the practice in revenue and admiralty cases, reach the conclusion: "It thus appears that in revenue cases, as in admiralty, default entered establishes the facts averred in the libel or information as effectively as they can be established on hearing, and warrants a decree of condemnation if the information contains the necessary averments." It is respectfully suggested that the judgment of default against all persons is no judgment against the *res*. The evidence, which generally includes the entered confession of all persons, should be offered and received against *the defendant*, (*i. e.*, the *res*), in a hearing after the default of all persons; for,

¹ Ante, Chap. xi.

without evidence against the thing sufficient to establish the *jus in re*, there can be no condemnation.¹

§ 375. **No Jury After Default.** The court held, rightly no doubt, that though the case of *United States v. Miller's Railroad Stock* was one at law, there was no need for a jury when there was no issue joined to be submitted to a jury for a verdict upon a question of fact; and it must be understood that when they said that there was no fact to be ascertained after the default, they meant such form of default as embodies the confession of all persons. In a case *in personam*, a fact admitted is not given to the jury to be found. If it be said that confession by all persons is not confession by the *res*; and that the offering of such confession, at the final hearing, as evidence against the *res*, is then such an issue as should go to the jury, we answer that in such case there could not possibly be any joinder of issue by the thing defendant, nor any issue to go to the jury. The confession of all persons is sufficient evidence against the *res* to justify judgment against it,² conclusive as to all persons.

§ 376. **Held, that Confiscation is Under the Law of Nations.** The court, through Mr. Justice STRONG, next proceed to overrule the jurisdictional position they had taken, under the same leadership, in *Bigelow v. Forrest*, with regard to the character of the act of 1862. They now hold that the 5th, 6th and 7th sections of that act authorize and regulate confiscation of certain species of enemy property, by virtue of the law of nations. It is true they evidently fail fully to say that the authorization to proceed is by municipal statute, while the right and power to confiscate is by the laws of nations as incorporated into our constitution; but they seem fully to concede now that they were wrong in the *Forrest* case when they held these sections to be a criminal statute to punish citizens for acts of treason, by a "forfeiture" of their property without any *jus in re*.

Again is re-affirmed the doctrine of the consolidated prize cases:³ that rebels are *enemies*; and rebels' property, *enemy*

¹ Ante, § 99.

² Id.

³ The *Hiawatha et al.*, 2 Black, 636.

property, as understood by the law of nations, and as confiscable under that law. And, as if to give the "Joint Resolution Explanatory" relief from the weight previously put upon it, Judge STRONG says for the court, that the Constitution imposes "no restriction upon the power to prosecute war or confiscate enemy's property." One would conclude that the resolution must hereafter be confined to "forfeiture" where "punishment" and "offender" are concerned, and not extended to cover "confiscation," where the "crippling of the resources" of "enemies" is the object of a civil proceeding *in rem*.¹

§ 377. Dissent. All the justices did not desert the Forrest case. Three² dissented;—two of whom put their objection on the one distinct ground that the case against the railroad stock was a penal and criminal action against Miller. This position is similar to that occupied by all the bench in the Forrest and McVeigh cases.

The argument is: (1.) That the property of Miller was proceeded against to be "forfeited" for "certain overt acts of treason" committed by him as its owner. (2.) That as such criminal acts were not done by the railroad stock as the instrument of crime;—not committed in, with or by the stock,—it cannot be condemned by proceedings *in rem*. (3.) That the only way to forfeit it is by the previous indictment and conviction of Miller for his treason under the first four sections of the act of 1862; and by the construction of the second four, (with the Joint Resolution Explanatory as a *proviso*), so as to make them add forfeiture of property as a penalty; and by the proceedings *in rem* being made a sort of *addendum* to the treason trial. (5.) That the "forfeiture" of a citizen's unused property for his personal treason, by suit against it, is unconstitutional.

No doubt, if the law authorizes confiscation for personal *acts* of citizens not connected with the thing, it is certainly unconstitutional. The act does not make forfeiture of lands a penal result of

¹ That all confiscation of enemy property is under the law of nations, see Chap. xxix., §§ 261, 262, 263; Chap. xxx., §§ 265-275; Chap. xxxi.,

§§ 277 et seq.

² See dissent of Field and Clifford, J. J., 11 Wall. 314; and Davis, J., Id. 328.

the conviction of enemies; and, if it did, no suit *in rem* need follow. It does not authorize that a penal forfeiture for personal crime shall be decreed against an innocent, unused thing. It does not even authorize the condemnation by regular proceedings *in rem*, in a court of nations, of enemy property, unless there is a *jus in re* vested in the libellant.

What two of the dissenting judges have said about the necessity of a further hearing after default, is somewhat in accord with what has been said elsewhere in this treatise upon this point;¹ though we do not wish for a moment to be understood as saying that, as against any party but the *res* itself and the claimants who have appeared and stipulated, there is any need of going beyond the taking of the information as confessed. What views three of the judges have advanced against the majority on the subject of seizure, need not now be here discussed. The seizure of the railroad stock was good if made by notice upon the president or acting presiding officer of the railroad company, if the company had possession or control of the property. If the constructive seizure was not legally made, no doubt the whole proceedings in the case were null.²

§ 378. **Doctrine that Forfeiture is Limited as in Case of Treason, Overruled.** The very next case reported after *Miller's*, is an ejectment case;³ one somewhat like that of *Bigelow v. Forrest*. It grew out of a case of the *United States v. Tyler's Land*, based on the secs. 5, 6, 7, 8 of the confiscation act of 1862. The land had been condemned as hostile property and sold at auction. Defrees afterwards purchased it. Tyler, the former enemy owner, brought his action of ejectment against Defrees for the land, and the whole question turned upon the validity of the decree of confiscation.

The case of *Miller v. United States* involved personal property; but its principles were fully applied to this, which involved realty. Justice MILLER states the question of the contest to be, "Whether the confiscation proceedings * * * divested the title of the plaintiff in the lot?" The decision is in the affirmative, and the suit treated throughout as one against

¹ Ante, § 99.

² Chapter v.

³ *Tyler v. Defrees*, 11 Wall. 331: *Miller, J.*

hostile property without reference to any personal offense. The court say, "As the act [of 1862] was designed to introduce the principle of confiscating enemy property seized on land, like that seized on water, applying the confiscation, however, to the property of a limited class of enemies, instead of to all enemies, it was conceived that the proceeding should be, in its essential features, analogous to those which the courts of admiralty were accustomed to use in property captured at sea. The same courts were to have jurisdiction, the same officers were to administer the law." * * * "The cases * * * decided, and especially the case of *Miller v. United States*, in effect disposed of all the objections taken to the action of the [District] Court in this case, even if that action were here for review directly, instead of being presented collaterally in another suit." Among the objections taken against the action of the District Court which had decreed the confiscation of Tyler's land as hostile property, were that the confiscation act was a penal statute; the authorized proceeding to confiscate property, a criminal prosecution; the indictment of the enemy land owner by a grand jury, necessary; the confronting of the "offender" by his accusing witnesses, necessary; the perpetration of the "offense" through the instrumentality of the land as a "guilty" thing, essential to the "forfeiture," etc.: all of which, though plausibly inferable from the decisions of *Bigelow v. Forrest* and *McVeigh v. United States*, had been signally refuted in *Miller v. United States*, and were now fully exploded by a majority of the court, after full re-argument of all the questions.¹

§ 379. **Dissent.** This decision had the concurrence of all the justices except two² who had dissented to that of *Miller v. United States*; for though a third³ differed from the majority in a part of their opinion, he concurred in the judgment; and, as in the *Miller* case he had agreed with the majority in the "opinion respecting the constitutionality of the acts of Congress under review," [acts of 1861 and 1862 authorizing the

¹ Proceedings *in rem* necessarily, civil, §§ 21, 25, 26; condemnation fixes the *status* of the thing, §§ 110, 111.

² Justices Field and Clifford.

³ Justice Davis.

methods of procedure against enemy property,] he may be considered as now with the majority in the conclusion that the confiscation proceedings were not for "offenses" against an "offender," for "forfeiture" under a "penal" act.

The dissenting judges understood the decision of the case of *Tyler v. Defrees* as a reversion of the doctrine previously held. They combated it because it was contrary to *Bigelow v. Forrest*, and *McVeigh v. United States*, in which they had concurred. They use the same arguments which they had employed when dissenting from *Miller v. United States*. They agree that only jurisdictional questions can be considered in this collateral attack upon the confiscation decree of the District Court, but say "No objection is narrow or unsubstantial which goes to the jurisdiction of the court to forfeit the property of a citizen upon *ex parte* proceedings, without a hearing, for alleged public offenses of which he is assumed to be guilty because he did not appear to a citation which the law prohibited from being communicated to him."

They reiterate that "the act of Congress * * * is highly penal in its consequences;" and they further contend that proceedings *in rem* under the act should be as against an *offending* thing, with the *jus in re* found in the fact of its use in the commission of the offense; that, (though they fully admit that a government has the same rights of war against rebels as against alien enemies,) the government cannot, though authorized by the political power thereof, go beyond the modern modifications of the *jus gentium*, in the confiscation of enemy property seized on land. These arguments were reiterated, by way of dissent, in this case where land was involved, as they had been advanced, in the one immediately preceding it in the reports, where personal property was the subject of controversy; but after full argument by counsel, and full discussion at its own board, all the justices but two held to the established doctrines on the confiscation of hostile property.

§ 380. **Civil and Unrestricted Jurisdiction Re-affirmed.** These doctrines remained thus settled to the 18th of Wallace, no important case on the subject intervening unless we mention

that of *Brown v. Kennedy*¹ which turned mostly on a question involving the method of the seizure of an intangible *res*, and one on the law of estoppel. The case is in accord with *Miller v. United States* and *Tyler v. Defrees*, and there was but one dissenting voice.² The court rest their decree upon the sole authority which they cite, that of *Miller v. United States*, and say, "To the doctrines laid down in that case we adhere; and, as the marshal's return conclusively establishes that the credit was seized, and was therefore within the jurisdiction of the court, we must hold that the decree of condemnation was warranted, and that the debt was effectively confiscated." The question of the validity of the decree, as in the *Tyler-Defrees* case, had come up by a collateral action; but it is impossible—in a judicial point of view impossible—that the decree could have been sustained under the circumstances, if the Supreme Court had believed that the United States District Court of Kansas had decreed the "forfeiture" of an "offending" "citizen's" property, as a "guilty thing," without any "offense" having been committed by its use, under authority of a "penal" statute, designed for the "punishment" of the "offender," and to "punish" him without indictment, personal trial and due process of law in all respects. The whole theory of the decision in *Brown v. Kennedy* is in accord with the doctrine that the confiscation sections were against property, not persons; against enemies' property, not citizens' property as such; and that the confiscations were limited only by the property classifications in the act.

§ 381. **Criminal and Restricted Jurisdiction Re-asserted.** The doctrine of the right of a nation to take unqualifiedly the property of the designated classes of domestic enemies on account of its hostility, was held from the eleventh to the eighteenth of Wallace's reports, if time may be counted in that way. In the eighteenth, there is a discordant case.³ It originated from a suit in Louisiana: "*The United States v. Two Squares of Ground*, property of J. P. Benjamin." The land

¹ *Brown v. Kennedy*, 15 Wall. 591: Strong, J.

² *Day v. Micou*, 18 Wall. 160: Strong, J.

³ Mr. Justice Field.

had been confiscated and sold—no claimant or intervenor appearing for the *res* or its proceeds. In 1868, Madame Micou, who had for ten years held a mortgage against the land, brought a personal action, (or rather her heirs brought the action,) against Benjamin as mortgagor, and Day, (who had been the purchaser at the confiscation sale,) as tenant in possession. Day alone defended, claiming the property free from all liens, by virtue of the title given him by the United States, conveying to him the two squares of ground in consideration of the price paid, to have and to hold, in his own behoof, his heirs and assigns forever; and he pleaded *res adjudicata*. Day took up the case from the Supreme Court of Louisiana, for the alleged errors that that court had held that no estate but the life estate of Benjamin had been confiscated and sold, and that the mortgage of Micou still rested undischarged upon the land.

Now the justices unanimously re-affirmed *Bigelow v. Forrest*. They now held the confiscation sections to be punitive; that condemnations thereunder are for the offense of some person; that there could be no seizure of anything more than that which belonged to an offending person; that only the life estate of an offender could be forfeited. Much ambiguity, however, appears; for the seizure of things, the condemnation of things, and the termination of the rebellion as the purpose of the statute, are all mentioned with approval in the exposition; all of which seem incongruous with the principal ingredients of the decision. The court even say, (rather apologetically, however,) "It is true, proceedings *in rem* were ordered to be instituted in the District Court, but the question remains, what was the *res* against which the proceedings were directed? The answer must be, that which was seized and brought within the jurisdiction of the court." The ambiguity arises from the use of the criminal terms mentioned, and the concession by the court that the proceedings under the act were to be *in rem*, and that the *thing* seized was to be brought into court for trial and not any person. This case has not the clearness of Miller's, and Tyler's; nor of some of the dissenting opinions which perspicuously present views opposed to these decisions, plainly

asserting the confiscation sections to authorize criminal proceedings.

The application of the explanatory resolution to these sections slightly relieves the ambiguity; for, though it is clearly inapplicable to suits in which no person is prosecuted, no offender known, and no punishment inflicted, yet by the use of it here as an *addendum* to those sections, the justices evidently meant to give the preference to the hypothesis that the proceedings were punitive and even criminal.

§ 382. **Things Hostile Confounded With Things Indebted.**

The other theory, that the proceedings should be *in rem* against enemies' property, (as the act has it,) is further shown to have been overlooked by the court. This appears from the following general views which they expressed: "A condemnation in a proceeding *in rem* does not necessarily exclude all claim to other interests than those which were seized. In admiralty cases and in revenue cases a condemnation and sale generally pass the entire title to the property condemned and sold. This is because the thing condemned is considered as the offender or debtor, and is seized in entirety. But such is not the case in many proceedings which are *in rem*. Decrees of courts of probate or orphan's courts directing sales for the payment of a decedent's debts or for distribution, are proceedings *in rem*. So are sales under attachments or proceedings to foreclose a mortgage, *quasi* proceedings *in rem*, at least. But in none of these cases is anything more sold than the estate of the decedent, or of the debtor or the mortgagor in the thing sold. The interests of others are not cut off or affected."

Do the court mean to say that it is *only* where a thing is condemned as the offender or debtor, that it is confiscated in entirety? What shall we say of an alien enemy's vessel, which is condemned for hostility because of its ownership? Does not such condemnation affect the title as fully? And is the allusion to the decrees of probate courts, sales under attachments and foreclosures of mortgages, in point? Have such orders against things indebted, any characteristic in common with the proceedings authorized against enemy property by the statute?

Every reason is wanting in these probate and other orders and sales mentioned, to render them conclusive against all the world. There is no notice given to all the world to come forward and claim; there is no taking of default and judgment *pro confesso* against all the world. Why did not the organ of the court cite a class of cases which are remarkably analogous: prize cases? He had done so emphatically in *Miller v. United States*. Not only in our own country, but everywhere; not only at this day, but always, it has been held that the confiscation of a prize ship strips it of all liens and privileges and claims, not only of enemies who are not allowed to assert them, but even of friends when they have failed to assert them and to make rebuttal of the charge of hostility brought against the vessel.

§ 383. **Notice Disregarded.** The case of *Day v. Micou* goes farther from the settled practice governing suits *in rem* than has been above indicated.

1. It is contrary to the settled doctrine of notice.
2. It disregards the judgment by default against all persons.
3. It disregards the finding of fact as to what was the *res*.

(1.) In common with jurists everywhere, those in the United States had always held that notice by seizure and publication is notice to every person in the world, with effect equivalent to a personal citation in a personal action. In the original suit against ex-Senator Benjamin's two squares of ground, there had been both seizure of the ground and published monition calling upon "all persons having or pretending to have any right, title or interest *in* or *to*" the property to come forward and claim their rights within a stated period. All persons were thus cited to assert their right, whether *jus in re* or *jus ad rem*. Madame Micou had a mortgage lien already due and exigible; her claim was not *to* the property but *in* it; she had a *jus ad rem*: how could she disregard the notice without incurring the usual consequence?

Even though an enemy, she might have appeared, if the court was right on the question of McVeigh's right to appear in the confiscation case against his property. And if an enemy may appear in response to notice, on what ground can he be excused

from appearing, so as to avoid placing himself in the category of those who have always been held in contumacy and default for non-appearance?

If Mrs. Micou was a friend, and not an enemy, was her right to appear any the less? If, under the ruling of *McVeigh v. United States*, an enemy may go into the courts of the opposite belligerent and assert his rights in response to notice: and if it be assumed that the justices meant to recognize an enemy as having no greater rights than a friend, it follows that Madame Micou, whatever her personal *status*, had the right to assert her *jus ad rem* against the *res* or its proceeds; and that she therefore should have done so before the expiration of the period fixed for appearance in the published monition, or, at least, before the judgment of distribution,

§ 384. **Default Disregarded.** (2.) She was defaulted. There was a judgment of default rendered against her. It was a final judgment. It could not be attacked collaterally. It was held by all the justices in *Tyler v. Defrees*, (as indeed it had always been held before,) that a final judgment could not be attacked except upon jurisdictional grounds. Now the final judgment by default against Madame Micou, after she had been duly cited, in the original confiscation case of *United States v. Two Squares*, (described by metes and bounds, and also described as the property of J. P. Benjamin,) was not attacked, in the suit of Micou against Day, upon any jurisdictional ground. Yet the Supreme Court of the United States, following the State Court of Louisiana, (neither court sitting as a court of appeals or of review from the United States District Court which had rendered the final judgment of default against Micou,) disregarded that judgment.

§ 385. **Finding of Facts Disregarded.** (3.) The United States District Court had found the fact, as alleged in the libel taken *pro confesso* and received in evidence, (in the original confiscation case of *United States v. Two Squares of Ground*,) that the ground was hostile and of the confiscable class of hostile property. Now the justices say that it had no legislative authority so to find, because a *jus ad rem*, not asserted, rested upon the property, which was not libelled or proceeded against,

and which cannot be presumed to have belonged to the confiscable class of hostile property.

Suppose the *res* to be a ship, not caught *in delicto* but simply owned by an enemy; and, after due condemnation, the enforcement of a previous hypothecation should be attempted by a collateral action: could it be rightly said that the ship was not the *res*, (though so alleged in the libel and so found by the court,) but that the ship, *minus* the lien upon her, was the *res*? Could this be successfully said by a court trying a collateral action? It could not, though the hypothecation was upon a bottomry bond so favored of the law.

Now, with regard to the question, "What is the *res*?" in any case *in rem*, against a thing *guilty*, or *hostile*, or *indebted*; whether under the act of 1862, which limits confiscable enemy property to certain classes of enemy property, or under any other statute, or under the general law governing all such actions, the finding of the court as to what is the *res* is a fact not to be inquired into after judgment except by writ of error.

The legal reader will remember the importance attached to seizure and notice in the cases of *Miller* and *Tyler*, by all the justices, especially those dissenting; and more especially to the emphasis placed upon the finding of the facts, by the latter.

§ 386. **Life Estate Confiscation Set Aside.** Although *Day v. Micou* was erected upon *Bigelow v. Forrest* as a foundation, (notwithstanding that foundation had been altogether removed by *Miller v. United States*,) yet there are these differences:

1. Douglass Forrest, the collateral assailant of the judgment against the condemned *res*, had no claim whatever to be asserted at the time of the notice, default, personal judgment against all *pro confesso*, and the final decree *in rem*: Madame Micou had her mortgage all the time, due and owing, ripe for action. Would it be said that had Douglass held the fee at the time, and French Forrest only a life estate, and the fee had been libelled, the former ought not to have asserted his *jus in re* at the trial?

2. The congressional exposition, or explanation, or explanatory resolution, was made the ground of limiting the *res* to less than what the District Court had *found* it to be, in the Virginia case: that resolution had nothing conceivable to do with the

limit of the *res* to an indefinite quantity which may be algebraically expressed as *x minus* mortgages, liens and privileges. If only the life estate of French Forrest, owner in fee, could be confiscated, that is no precedent for holding that only Benjamin's land held *in fee*, *minus* a mortgage covering the whole value of the land *in fee*, could be touched by the government, after the usual opportunity had been given to all persons to set up any such mortgage. If the *res* is shorn down to endure but for Benjamin's lifetime; and if then that lifetime duration is extinguished during his life, by the foreclosure of a mortgage reaching the *fee simple*, it is easy to see that the *Day v Micou* case goes far beyond that of *Bigelow v. Forrest* in what seems to be the wrong direction. However, it has since been happily overruled in The Confiscation Cases of the twentieth of Wallace.

3. There is this distinction between the Forrest case and that of Day, in the facts of the cases:

In the former, only the right, title, interest and estate of French Forrest were libelled, say the Supreme Court; but, in the latter, not only the right, title, interest and estate of Judah P. Benjamin were libelled, but the land itself, duly and with certainty described, together with the right, title, etc., was libelled.¹ The distinction may be without a difference, since the court admitted that French Forrest's title was a title *in fee*, and based the opinion on that assumption. They said that more had been libelled than should have been; that the excess beyond the life estate should not have been libelled and was not confiscated; and, on this assumption, the jurisdiction of the Supreme Court was based. True, this has been overruled, and it has been said that all which French had, whatever it was, was confiscated, as we shall hereafter see.

§ 387. **Statement of the Confiscation Cases.** The Confiscation Cases in the 20th of Wallace,² come next in order, in the history of the exposition.

The leading and most important one was that of *United*

¹ Record of the United States v. Two Squares of Ground, etc., a transcript of which may be found in the

Clerk's office of the Supreme Court in the case of *Day v. Micou*.

² Pages 92-117: Strong, J.

States v. Ten Squares and 844 lots of Ground, briefly designated by the reporter as Slidell's land. The other was *United States v. Conrad's Lots*. This real estate had been seized and libelled in New Orleans, in 1863, though the condemnation was not till 1865. The land itself, *with* all the right, title and interest of John Slidell therein, (to illustrate by the larger case, the other being just like it,) was the subject of seizure, the thing declared against in the libel of information, the thing condemned, the thing sold. All persons were duly notified; all were duly decreed to be in contumacy and default except certain intervenors; a trial against the *res* followed; the confession of all persons as well as further evidence was offered and received against the land, and there was a decree declaring it confiscated; and the new title, which thereupon arose in the government, was duly advertised without qualification, and was duly sold to the highest bidders in market overt, and full titles in fee given by the government to the purchasers, after all liens and mortgages had been erased, (except those allowed, and paid out of the proceeds,) by order of the court.

Some five years after such condemnation and sale, the case was removed to the Circuit Court upon writ of error granted to some of the defaulted parties, (erroneously, as must necessarily be seen, since they had failed to appear in time to take the *onus* of claimant upon them by filing stipulation and subjecting themselves to liability for costs; and since the default had not been set aside;) when, a justice of the Supreme Court presiding, the confiscation decree was reversed, really because the allegations of the libel had not been in accord with the hypothesis that the act of 1862 authorized personal prosecution against owners of enemy property, or proceedings equivalent thereto. Because there were alternate allegations, allowable in informations *in rem*, forbidden in criminal indictments, the decree was reversed.

§ 388. **Previous Erroneous Rulings all Overruled.** The Supreme Court held that the alternate allegations were sufficient as against the land;

That "the liability of the property" was the only subject of inquiry;

That "no judgment was possible against any person;"

That "the enactment of Congress was that the *property* belonging to *any one* embraced within several classes of persons should be subject to seizure and condemnation;"

That "persons were referred to *only to identify the property*;"

That "reference to the ownership was the mode selected [by Congress] for designating that which was made liable to confiscation;"

That "if the property belonged to a person who had filled any of the offices specified, or who had done any of the acts mentioned in the fifth, sixth, or seventh articles of the information, it was the *property* which the act had in view;"

That the United States had only to aver and prove that the *lots and squares* seized belonged to *some one* who was one or other of the persons referred to in the fifth or sixth sections of the act of Congress;

That "in view of what was said [in *Miller v. United States*, 11 Wall. 268] and decided, and in view of the authorities cited, it must be held that the default established the truth of all the material averments in the information;"¹

That default is "equivalent in effect to a confession;" and "while it is true a party cannot, by consent, confer jurisdiction where none would exist without it, it is equally true that when jurisdiction depends upon the existence of a fact, its existence may be shown as well by the confession of a party as by any other evidence;"

That "everything necessary to a common law proceeding *in rem* is found in the record: an information was filed, * * * a monition issued, a default taken, and, after consideration of the evidence, condemnation was adjudged;"

That "copies of the information, of the warrant and of the order of the judge" were posted; the "monition which was a citation," published, and "the service was, therefore, sufficiently made;"²

That it was not necessary "to conclude 'against the statute,'" because that form is "inapplicable to civil proceedings."³

¹ 20 Wall. 108; *Vide*, ante, §§ 90-98.

² *Id* ; Ante, § 63.

³ 20 Wall. 110.

§ 389. **Confiscation Held Irrespective of Persons.** Finally, they said: "A further objection urged against the adjudication of forfeiture made by the District Court is, that it was made without any finding that the property belonged to John Slidell, or any person included in either of the classes designated in the fifth and sixth sections of the confiscation act. This is a renewal of the complaint so earnestly pressed in *Miller v. United States*, and which we held to be without foundation. It is said notwithstanding the default, it was the duty of the court to 'proceed to hear and determine the case according to law, as is directed by the eighty-ninth section of the act of March 2, 1799, respecting forfeitures incurred under that act.' But, were this conceded, of what avail would it be in this case in support of the objection? The court did proceed to hear and determine the case after the default was entered. And it was not until after such hearing and consideration that the property was condemned. This appears by the record. Having heard and considered evidence, it must be presumed that the court found that the property belonged to a *person* engaged in the rebellion, or one who had given aid or comfort thereto, as well as all other facts necessary to the rendition of the judgment. This is a presumption always made in support of judgments of courts after their jurisdiction is made to appear."¹

The judges who had dissented in *Miller v. United States* and *Tyler v. Defrees*, now renewed their dissent; for the rest of the justices no longer agreed with them.

§ 390. **Statute Right to Intervene, Denied.** But it may be inquired, "how can the opinion on the claims of the intervenors,² be reconciled with that of the main case?" It cannot. It is based upon the idea that the proceedings were a personal prosecution of an offender, while the decision in the main case strictly follows the act of Congress and affirms the judgment of the District Court which had condemned Slidell's land as enemy property. It is modelled on the forms of the Forrest and Micon cases, and it excites no opposition from the judges dissenting from the main case.

¹ 20 Wall. 112; Ante, §§ 99, 107.

² Claims of Marcuard et al., 20 Wall. 114.

What were the claims of *Marcuard et al.*? They were interventions filed in response to the published monition, which was equivalent to a citation, to assert liens against Slidell's land. *Marcuard* was a Paris banker; the other appearers were the Citizens' Bank of Louisiana, and the Merchants' Bank of New Orleans. Both the District and Circuit Court had recognized their right to intervene, but had decreed against them on the trial, because they had not sustained their interventions by the necessary proof.

The Supreme Court said that "they ought not to have been allowed to intervene. They had no interest, even if they were lien holders, in the confiscation proceedings. It was only the right of John Slidell, whatever that was, that could be condemned and sold, and the sale under the judgment of condemnation in no degree disturbed the liens. By the decree of condemnation, the United States succeeded to the position of John Slidell." * * * How the author of this can reconcile it with the opinion that goes before, in the same case, it is difficult to understand.

"Ought not to have been allowed to intervene?" Why, the right was a statute right, if the liens were such as were contemplated by the act which expressly authorized interventions upon liens in confiscation cases.¹ *Viperina est expositio quæ corrodit viscera textus.*—*Coke*.

If the liens were not such as could be enforced by the laws of a loyal state, as provided in the act cited, authorizing interventions in confiscation cases, doubtless they should have been adjudged against, as they had been, on that very ground, by the courts below. Other interventions below had been there allowed, such as the State's and city's liens *in fee* for taxes: and these the Supreme Court did not discuss. But the latter, by their opinion, would seem to be about to dismiss *Marcuard et al.*, as in case of non-suit: whereas, they really affirmed the decree of the lower courts concerning those intervenors.

In affirming the action of the District and Circuit Courts,

¹ Act of March 3, 1863, 12 Stat. at L. 762; U. S. Rev. Stat. § 5322.

they affirmed a final decree against *Marcuard et al.*, whatever they may have meant to do.

Marcuard et al.'s right to appear, if they brought themselves under the act allowing intervenors in confiscation cases, is incontestable under the rulings of the main case, that the published monition was good, and equivalent to a citation.

§ 391. **Enemy Land Was the Res.** As to their having no interest because the land mortgaged to them was not the *res*, but the *res* was the usufruct of the land for the lifetime of the enemy, it may be replied that the court had just held that the *res* was enemy land, and that the name of its owner need not be stated at all; in other words, that it is merely for the purpose of describing the land that the proprietorship is mentioned. These lien-holders, so far from having no interest, were bound to appear and claim their mortgage rights, or lose them irretrievably under the judgment defaulting all persons.

The court held the default and confession regular; but of what import were these, if nobody could be affected by them? Had not Marcuard appeared in time, would he not have been defaulted? Ought he not have been allowed to avoid such results?

As to the United States succeeding to the position of Slidell, "whatever that was," the case shows what that was; in other words, Slidell's position was that of *fee simple* owner. The United States took the "new title paramount" arising from forfeiture; but if they "succeeded" Slidell, they became owner of land, not of a mere *jus ad rem*, (as life estate is,) and the land was all the more valuable because all the liens and mortgages were, by this decision, forever swept away. For there can be no doubt, (if a writ of error may be sued out by a defaulted enemy, without stipulation,) that the Supreme Court had jurisdiction; since the judgment of confiscation was not here attacked collaterally as in *Bigelow v. Forrest* and *Day v. Micou*.

"The Confiscation Cases" of the 20th of Wallace, included Conrad's lots; and all that was said of Slidell's land, was also applied to those lots. Both were disposed of together by the Supreme Court. The "Ten Lots of Ground," condemned under

the description by metes and bounds and the further description that they belonged to Conrad, were held by the Supreme Court to have been lawfully and finally condemned as enemy property. There was no reservation; no mention of a life forfeiture; no placing of the case under criminal or penal laws. Conrad was, as claimant, adjudged against; and the decree was *res judicata* as to him and as to all the world.¹

¹ Post, §§ 405-411.

CHAPTER XXXVIII.

ABSOLUTE CONDEMNATION.

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§ 391. **Unqualified Confiscation of Hostile Land Unanimously Held, and Intervention Allowed.** In *Semmes v. United States*,¹ we have the unanimous opinion of the justices that the

¹ *Semmes v. United States*, 1 Otto, 21: Clifford, J.

res which was condemned was land itself, and not merely a temporary right in the land; that a person having an interest must assert it in response to the monition, or he will be remediless.

Said the court: "Proceedings *in rem* were instituted in the District Court on the 7th of August, 1863, under the confiscation act of July 17, 1862, against certain real property of the respondent; which proceedings resulted, on the 5th of April, 1865, in the condemnation of the property described in the libel. On the 11th of the same month, a writ of *venditioni exponas* was issued, commanding the marshal to sell the property. * * * Two lots of land were embraced in the libel and decree of condemnation, which, in fact, were not the property of the respondent. Accordingly, the true owner of the same * * * filed a petition in the same court, [was allowed to intervene in the case,] setting forth his right to the two lots." * * * By consent, the case was opened after judgment to allow him to assert his claim; and he had judgment of restoration.

"Argument to show that the true owner of those lots" [the two which were the subject of the intervention, which had been condemned with the rest before the intervenor's appearance, but, for the claiming of which, the decree had been opened by consent,] "without such consent in writing, *would have been remediless*, is unnecessary," said the justices unanimously, thus overruling the *dictum* that Marcuard's remedy remained after the condemnation of the land on which his alleged mortgage lien rested. If the above quotation does not mean this, we must draw a distinction between the legal right to intervene for the purpose of asserting a *jus in re*, and the legal right to intervene for the purpose of asserting a *jus ad rem*. The distinction is impossible to the judicial mind.

The Supreme Court further say in Semmes' case: "Properties condemned as forfeited to the United States, under the aforesaid act of Congress, become the property of the United States from the date of the decree of condemnation, 12 Stat. 591, Sec. 7. Judgment of forfeiture was rendered in this case on the 5th of April, 1865, and the land in question became,

from that date, the property of the United States; * * * the title to the *land* was lost to him, [Semmes,] when it became vested in the United States." * * * "Beyond doubt, the original decree of the District Court was complete and correct." * * * "Such proceedings under the confiscation act in question are justified as an exercise of belligerent rights against a public enemy, and are not, in their nature, a punishment for treason. Consequently, confiscation being a proceeding distinct from, and independent of, the treasonable guilt of the owner of the confiscated property, pardon for treason will not restore rights to property previously condemned and sold in the exercise of belligerent rights, as against a purchaser in good faith and for value. *Miller v. United States*, 11 Wall. 267; Confiscation Cases, 20 Id. 92; Gay's Gold, 13 Id. 351."

§ 392. **Previous Contrary Rulings Overruled.** Is this decision in accord with those in which it was held that not *land*, but a *right in* the land measured by the foe's life, is the *res*, though the land itself be seized, fully described and condemned in terms? and those in which it was held that the proceedings are against an offender for his *acts*? and those in which it was held that the proceedings were disguisedly, if not openly, for the punishment of treason or some crime? and those which held the proceedings to be under municipal law and not under the law of nations? and those which held that the United States do not become owners of the condemned land but that heirs of the late enemy owner may yet inherit from him? and those which held that a judgment regular in all respects, condemning land under the act, may yet be collaterally attacked?

There is a citation of the Forrest and Micou cases, near the end of the opinion, but merely on the point that the restoration of the two lots to the intervenor did not affect the validity of the condemnation of the remaining lots of Semmes.

There is nothing in the entire opinion in Semmes' case which is not in full accord with the views expressed in this treatise, and which does not harmonize with the long established system herein treated; yet with the decisions based upon the theory of personal prosecution for forfeiture as a penalty, it cannot be reconciled.

§ 393. **A Case Inconsistent in Itself.** The case following, in the same volume,¹ fails to decide between the contending doctrines. "The confiscation law of 1862," it is stated, has been "construed to apply *only to public enemies*," * * * yet it is said, in close connection, that the pardon of the enemy Osborn covers "*the offenses* for which the forfeiture of his property was decreed."² Then immediately follow expressions such as these: "The pardon of that *offense* necessarily carried with it the release of the penalty attached to its commission." "It is of the very essence of a pardon that it releases the offender from the consequences of his offense." "If the proceedings to establish his culpability and *enforce* the penalty," etc. And, on the next page, it is said that "the forfeiture results * * * from the offense which the decree establishes and declares."³

Under the construction that the law applies only to public enemies, all that follows seems unwarrantable.

Under the construction that it applies only to offenders, how can they be constitutionally punished without indictment or presentment of some sort, and jury trial, and conviction, and sentence? or, how can a *guilty* thing, (which is indeed forfeited at the time of the commission of the offense,) have its forfeiture legally and constitutionally declared, by proceeding *in rem*, unless the offense has been committed in, with or by that thing?⁴

It is not in place here to discuss the question of pardon, which is the leading topic of the Osborn case: only to the matter of the two constructions is attention called. And that leads to these suggestive questions:

The confiscation proceedings under the act having been herein construed at first, (as previously before,) "to apply only to public enemies," (or rather "enemies," as the act plainly

¹ Osborn v. United States, (1 Otto,) 91 U. S. 474: Field, J.

² Id., p. 477.

³ Post, Chap. xli., §§ 448, 449; Ante, Chap. ii., §§ 21, 25.

⁴ The organ of the court in this case, while dissenting in those of

Miller and Tyler, 11 Wall. pp. 314, 349, showed conclusively that the forfeiture of the property of offenders without personal trial, and without any commission of offense by the use of the property, is unconstitutional.

requires, in distinct terms,) is it meant, by the subsequent remarks, that *enemy* property, such as a prize ship, cannot be confiscated except for some offense actually committed in, with or by it? and that, too, as a penalty which the public enemy is to be supposed to have incurred by contravention of our municipal laws? and that the condemnation, by the law of relation, must retroact to some particular offense done by, with, or in the ship?¹

§ 394. All the "Estate and Property" of the **Enemy Confiscated**. The next case² in order arose under the following circumstances: Wallach had borrowed five thousand dollars of Van Riswick, and given him a deed of a tract of land to secure payment. The land was confiscated at the instance of the United States, as enemy property. Van Riswick bought it of the successful libellant. Wallach returned from the war; and, being inconsiderately advised that only an estate in the land for the term of his own life had been condemned and sold, he transferred the fee to Van Riswick, that all title might be in the latter, under any circumstances. Wallach's wife joined him in the deed to Van Riswick. Wallach died. His heirs at law sued Van Riswick for the land, claiming to have inherited it from their father. Their case is the one now considered.

Was there, after the condemnation and sale, any interest left in Wallach, the father, which he could convey by deed? Was there, after both sales, any which he could transmit to his heirs as an inheritance? Let the Supreme Court answer both questions:

"The main question raised by the demurrer, and that which has been principally argued, is whether, after an adjudicated forfeiture and sale of an enemy's land under the confiscation act of Congress of July 17, 1862, and the joint resolution of even date therewith, there is left in him any interest which he can convey by deed.

"The act of July 17, 1862, is an act for the confiscation of enemies' property. Its purpose, as well as its justification, was

¹ Ante, Chap. xxix., §§ 257-263.

² Wallach v. Van Riswick, (2 Otto,) 92 U. S. 202: Strong, J.

to strengthen the government and to enfeeble the public enemy by taking from the adherents of that enemy the power to use their property in aid of the hostile cause. (*Miller v. The United States*, 11 Wallace, 268.) With such a purpose, it is incredible that Congress, while providing for the confiscation of an enemy's land, intended to leave in that enemy a vested interest therein, which he might sell, and with the proceeds of which he might aid in carrying on the war against the government. The statute indicates no such intention. The contrary is plainly manifested. The fifth section enacted that it should be the duty of the President of the United States to cause the seizure of "*all the estate and property, money, stocks, credits, and effects*" of the persons thereafter described, (of whom Charles S. Wallach was one,) and to apply the same and the proceeds thereof to the support of the army of the United States; and it declared that all sales, transfers, and conveyances of any such property should be null and void. The description of property thus made liable to seizure is as broad as possible. It covers the estate of the owner, all his estate or ownership. No authority is given to seize less than the whole. The seventh section of the act enacted, that to secure the condemnation and sale of any such property, (viz.: the property seized,) so that it might be made available for the purpose aforesaid, proceedings should be instituted in a court of the United States, and if said property should be found to have belonged to a person engaged in the rebellion, or who had given aid or comfort thereto, that the same should be condemned as enemies' property, and become the property of the United States, and might be disposed of as the court should decree, the proceeds thereof to be paid into the treasury of the United States for the purpose aforesaid. Nothing can be plainer than that condemnation and sale of the identical property seized was intended by Congress, and it was expressly declared that the seizure ordered should be of all the estate and property of the persons designated in the act."

§ 395. **The Fee Not Left in the Enemy by the "Resolution Explanatory."** Then, with reference to the Joint Resolution Explanatory, the court say: "Plainly it should be so construed as to leave it in accord with the general and leading purpose of

the act of which it is substantially a part, for its object was not to defeat but to qualify. That purpose, as we have said, was to take away from an adherent of a public enemy his property, and thus deprive him of the means by which he could aid that enemy. But that purpose was thwarted, partially at least, by the resolution, if it meant to leave a portion, and often much the larger portion, of the estate still vested in the enemy's adherent. If, notwithstanding an adjudicated forfeiture of his land and a sale thereof, he was still seized of an estate expectant on the determination of a life estate, which he could sell and convey, his power to aid the public enemy thereby remained. It cannot be said that such was the intention of Congress. The residue, if there was any, was equally subject to seizure, condemnation, and sale with the particular estate that preceded it. And it is to be observed that the joint resolution made no attempt to divide the estate confiscated into one for life and another in fee. It did not say the forfeiture shall be of a life estate only, or of the possession and enjoyment of the property for life."

§ 396. **But it is Held that the Bereft Enemy May Transmit to "Heirs."** In answer to the second question, "was there, after the sale by the United States to Riswick, and by Wallach and wife to Riswick, any interest left in Wallach to be transmitted as an inheritance, to his heirs?" The court said, (first referring to the resolution:) "Its language is, 'no proceedings shall work a forfeiture beyond the life of the offender'—not beyond the life *estate* of the offender. The obvious meaning is that the proceedings for condemnation and sale shall not affect the ownership of the property after the termination of the offender's natural life. After his death the land shall pass or be owned as if it had not been forfeited. There is nothing that warrants the belief it was intended that while the forfeiture lasts it should not be complete, viz.: a devolution upon the United States of the offender's entire right. The words of the resolution are not exactly those of the constitutional ordinance, but both have the same meaning and both seek to limit the extent of forfeitures. In adopting the resolution Congress manifestly had the constitutional ordinance in view, and there is no reason

why one should receive a construction different from that given to the other. What was intended by the constitutional provision is free from doubt. In England attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinherison of his heirs or of those who would otherwise be his heirs. Thus, innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed this was felt to be a great hardship, and even rank injustice. For this reason it was ordained that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted. No one ever doubted it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers. Its purpose has never been thought to be a benefit to the traitor, by leaving in him a vested interest in the subject of forfeiture."

After these views had been expressed, the court quoted in support of the personal theory, several English authorities concerning suits *in personam*; and could see no reason why construction applied to some criminal English statute should not be applied to the act of 1862.

§ 397. **No Life Estate Forfeiture; Bigelow v. Forrest and Day v. Micou Cited and Overruled.** The conclusion of the court is: "What was seized, condemned as forfeited, and sold in the proceedings against Charles S. Wallach's estate, *was not therefore technically a life estate.*"

"It is true," the court concede, "that in *Bigelow v. Forrest*, 9 Wall. 339, and *Day v. Micou*, 18 Wall. 156, some expressions were used indicating an opinion that what was sold under the confiscation acts was a life estate carved out of a fee. The language was, perhaps, incautiously used. We certainly did not intend to hold that there was anything left in the person whose estate was confiscated.¹ The question was not before us. We were not called upon to decide anything respecting the quantity

¹Therefore the District Court did not exceed its jurisdiction in condemning the fee.

of the estate carved out, and what we said upon the subject had reference solely to its duration."

The *decrees* in those cases were not *lapsus linguæ*. To Douglass Forrest was decreed his father's confiscated farm, and to Madame Micou's heirs was decreed Benjamin's confiscated land's worth. The decrees were put upon the ground that the *res* previously condemned, and then sued for, was life estate in land. Is it intelligible to discuss "quantity" and "duration" with regard to such a *res*? Not being called upon "to decide the quantity of the estate carved out," were they called upon to decide that any estate whatever had been carved out of a greater estate? The cautious language now used, compared with the confessedly incautious, used in the two cases cited, leaves the point of discussion still somewhat uncertain.

This much, however, it conveys: "We certainly did not intend to hold that there was anything left in the person whose estate had been confiscated." That is to say, nothing left in French Forrest. The *res* was "the estate," we now understand. It was entirely confiscated. But, the *decree*: how is it that that same "estate" was decreed, in the collateral action, to Douglass Forrest as heir? Was this, too, an oversight? One honestly has the right to assume that such decree was certainly not intended, since the superstructure must fall with the pillar that has failed to support it.

§ 398. **The Fee in the United States or the Purchaser.** Again, to quote from the opinion: "It is argued on behalf of the defendant that, because under a confiscation sale of land, or of estate therein, the purchaser takes an interest terminable with the life of the person whose property has been confiscated, the fee must be somewhere, for it is said a fee can never be in abeyance, and as the fee cannot be in the United States, they having sold all that was seized, nor in the purchaser, whose interest ceases with the life, it must remain in the person whose estate has been seized. * * * We are not, therefore, called upon to determine where the fee dwells during the continuance of the interest of a purchaser at a confiscation sale, whether in the United States or in the purchaser, subject to be defeated by the death of the offender whose estate has been confiscated.

That it cannot dwell in the offender, we have seen is evident, for if it does the plain purpose of the confiscation act is defeated, and the estate confiscated is subject alike in the hands of the United States and of the purchaser to a paramount right remaining in the offender. If he is a tenant of the reversion, or of a remainder, he may control the use of the particular estate at least so far as to prevent waste. That Congress intended such a possibility is incredible.

"If it be contended that the heirs of Charles S. Wallach cannot take by descent unless their father, at his death, was seized of an estate of inheritance, e. g., reversion, or a remainder, it may be answered that even at common law it was not always necessary the ancestor should be seized to enable the heir to take by descent. Shelley's case is, that where the ancestor *might* have taken and been seized, the heir shall inherit. (FORTESCUE, J., *Thornby v. Flectwood*, 1 Strange, 318.)"

And again: "Without pursuing this discussion further we repeat that to hold that any estate or interest remained in Charles S. Wallach after the confiscation and sale of the land in controversy, would defeat the avowed purpose of the confiscation act, and the only justification for its enactment; and to hold that the joint resolution was not intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death, would give preference to the guilty over the innocent. We cannot so hold. In our judgment such a holding would be an entire perversion of the meaning of Congress."

§ 399. **Fee in the United States, Between Condemnation and Sale.** The court first remark that they are not called upon to say, "where the fee dwells;" they add, "whether in the United States or the purchaser." Then, the reader has advanced thus far in the history of the exposition: to the decision that the fee simple title of real estate confiscated under the act of 1862, is vested during the lifetime of the immediately preceding owner, in *either the United States or the purchaser*.

This compels the conclusion that the fee is out of the late owner. It is out of him and his line. No heir can acquire it by descent from him.

And the problem, whether the United States or the purchaser

holds the fee, is easily solved, if we take the time between condemnation and sale. As there is then no purchaser, the dilemma of the court is avoided, and the solution is complete: The United States then hold in fee.

Whether the purchaser gets the fee from the United States, depends upon the contract of sale and the rights of the contracting parties and the observance of the provision of the act which requires the sale of that which is confiscated. The subsequent legislation¹ which authorizes the subdivision of estates confiscated, into forty acre lots, to be sold at private sale to refugees and freedmen, is a modification of the original provision.

The Wallach decision contains several expressions which show that what is condemned under the act is required to be sold.² But it is necessary now only to know that the condemnation takes all title from the enemy and that the United States become possessed of the fee.

§ 400. The "Resolution Explanatory" Held Amendatory. The court hold the act of July 17, 1862, to be free from doubt, but that the Joint Resolution Explanatory, passed along with it, amends the act. The sufficient answer is that the resolution itself professes to be *explanatory*, not *enactory*; that such legislative exposition is without authority; and that where the text of statutes is free from doubt³ and ambiguity, courts cannot inquire into the intent of the legislation. Besides, the resolution's reference to offenders against municipal law cannot rightly be construed to refer to enemies under the law of nations. The first four sections are criminal, which accounts for the use of "offender," etc., by Congress. If the resolution were enactory, and appended as a *proviso* to the whole act, it could not be interpreted, by the received rules, to apply to the middle four sections, so far as any limitation of "punishment" or "forfeiture" is concerned, but would only be referable to the penalty for treason and rebellion, to be levied on land, etc., provided in the first four, or criminal sections.⁴

What numerous difficulties radiate from such interpretation!

¹ 13 Stat. at L. p. 507.

² Ante, § 123; Post, § 425.

³ See the first page of the opinion

in the Wallach case, above cited.

⁴ See Chap. xxxvi., on that Act and the Explanatory Resolution.

How can the estate be said to be wholly taken from the former owner, and wholly given to the United States—and yet that that is for the benefit of the children? If not seriously given wholly to the United States, what right have they to step in between the creditors of the former owner and his property and prevent them from making their money out of the fee? Where did our representative and limited government get its authority to intermeddle thus between debtor and creditor with regard to private property not seriously confiscated as a whole? What right has it to prevent an owner from bequeathing the title of his property not seriously lodged in some other owner? What right has it to create a virtual entail of his real estate? What right has it to make provision for the benefit of the children, (as the opinion in Wallach's case holds the congressional explanation by resolution, to do,) since the Constitution will not permit the taking of private property from one to be given to another, (even for a time so limited and uncertain as a fighting enemy's uninsurable life,) without due process of law? If, as now held, the fee becomes the property of the United States when estates are condemned under the act, by what right can they donate it to anybody's children?

The Wallach case was briefly affirmed in *Chaffraix v. Shiff*.¹

§ 401. In Actions against Hostile Property, Held, that Claimants have Standing in Court in Actions against Guilty Property. More cases of McVeigh follow next in order,² but fail to get us out of the quandary. Like his case in the 11th of Wallace, they involve the question whether an enemy may appear in response to notice, and claim his property proceeded against under sections 5, 6, 7 and 8 of the act of 1862. And the question is very simply disposed of indeed; for, under the assumption of the *premiss* that the proceedings are against guilty things for violations of municipal law by their offending owners, it follows clearly enough that the owners should be allowed to respond to the notice and to be accorded standing in court. We can, under such a *premiss*, even sympathize with the indignation expressed

¹ (3 Otto,) 92 U. S. 214.

U. S. 274: Field, J.; Gregory v. Mc-

² Windsor v. McVeigh, (3 Otto,) 93

Veigh, Id. 284.

at the thought of inviting a man into court and then shutting the door in his face. We fully concur in the opinion that a default against an owner who has a right to appear, and has sought to appear, and has been denied that right; and a decree of condemnation against his property, would be void as to such person. But the learned organ of the court may have misapprehended Judge STORY, in the case he cites,¹ if he understands that judge to have said that had the notice been good to all the world and the proceedings otherwise regular in the case in Mexico, the decree would have been void *quoad* an enemy who was not allowed to respond to the general notice. There was no enemy concerned. The proceedings were *in rem* against a United States vessel, for violation of Mexican revenue laws; and the decision of Judge STORY, when confronted with the Mexican record in the case of Bradstreet, above cited, was that the record itself showed that there had been no proper seizure, notice, or libel, and therefore the decree might be treated as null in a collateral action, without any violation of international law. He said of revenue proceedings *in rem* against offending things, that they were like prize proceedings *in rem*, in this one respect: that both require seizure, notice, etc., in order to the validity of the decree; a coincidence that has been repeatedly mentioned by us herein when comparing the three different kinds of suits *in rem*. But, had we been at war with Mexico, and the vessel been condemned as enemy's property by regular proceedings *in rem*, after proper seizure and notice, and the Massachusetts owner, while an enemy to Mexico, had sought to appear in her court in response to the notice calling upon all persons "to appear and claim any right, title or interest they may have, or pretend to have, in or to the vessel," and upon attempting to respond to such notice, had been refused because he was an enemy, would Judge STORY have held the Mexican proceedings void as to the enemy owner? Such was McVeigh's position, so long as he refused to give up his enemy character. He would have had standing in court had he renewed his allegiance.

¹ Bradstreet v. Neptune Insurance Co., 3 Sum. 601.

It is perfectly manifest that had the opinions in these McVeigh cases started out with the doctrine of *the Miller, the Tyler, the Slidell, the Conrad and the Semmes* cases as a premiss, the conclusions found in the decrees must have logically been just the opposite of what they are: so we are not yet helped out of the difficulties which were really increased by the reconciliation essayed in the Wallach case.

§ 402. **Saving Estates from Creditors for Heirs, who take while their Ancestor Lives.** Now we advance to a very interesting decision confessedly modeled on *Wallach v. Van Riswick*.¹ On the one hand, it holds that the condemnation and sale of the lands of an enemy left nothing in him; that the condemnation and sale of Pike's land, "without any doubt, vested in the United States or the purchaser," the land which Pike had, free from all incumbrances made, after seizure, by the owner or his creditors; that from the date of the seizure, the land was beyond the reach of his creditors,² and that "all subsequently acquired rights were subject to the prior claim of the United States, if perfected by the decree of condemnation:" on the other, it holds that Pike's children became vested in some immediate rights in or to the property while the father yet lived; that the purchasers of the confiscated lands are mere tenants for life, (*i. e.*, for the elder Pike's life;) that "though it is true, as a general rule, that as long as an ancestor lives, the *heirs* have no interest in his estate," yet the confiscation act has conferred rights upon the "heirs apparent or presumptive of one whose estate in lands has been condemned and sold"—that is, upon the heirs of Pike who is alive and has "nothing left in him;" that the fee is "withheld from confiscation exclusively for the benefit of the heirs;" that Albert Pike's children, as his heirs apparent, are "apparently the next in succession to the estate;" that, "if they do not hold the fee [?] they are certainly the only persons now living who represent those for whose benefit the joint resolution of Congress was passed;" and, finally, that "as there is no one else

¹ *Pike v. Wassel*, (4 Otto,) 94 U. S. 711: Waite, C. J.

² But the creditors who were such before seizure might have intervened

if they had specific liens, and had proper standing in court as friends, by virtue of the act of 1863, March 3.

to look after the interests of the succession," [?] the children of Pike, while he yet lives, "may exercise the rights of fee simple owners so far as to bring suit, in their own names, against the purchaser," (who is now characterized as a mere tenant in possession,) for the protection of the property, the payment of the taxes, etc.

§ 403. **Neither Congress nor Courts can Divest Creditors' Rights.** Upon this exposition, containing both the repellant doctrines, we briefly remark:

No power is vested in Congress by the Constitution to pass any act or resolution to take private property from one citizen and give it to another: the resolution explaining the meaning of the confiscation act, (according to the court,) was passed by Congress to confer on children rights of ownership to their living father's property: so it was passed without constitutional power. No constitutional right is vested in Congress to interfere with a citizen's disposition of his own property by will or otherwise: Congress by the "resolution explanatory," so interferes, (if the Pike case construes it aright, and if the hypothesis be maintained that he who purchased all that was condemned is a mere *terre-tenant*;) consequently that "resolution explanatory" is in excess of the constitutional rights of Congress.

Courts have no right to legislate: interpolation into the resolution explanatory, (which merely says "no punishment or proceedings under this act shall be construed to work the forfeiture of the real estate of the offender beyond his natural life,") of prohibition of an offender's making wills or disposing of his property, and a creditor's attaching the offender's property for debt, when such property is not seriously confiscable to the government, except for a limited use, and not so confiscated for government purposes, is legislation: therefore, it is not authoritative.

Property cannot go from father to children by inheritance or otherwise, (whatever the *hiatus* between its condemnation and the father's death,) so as to escape execution for the debts of the father: Pike's children are held to have acquired present rights in his property to be partially enforceable in their own name now, and to be fully consummated at his death, free from the

father's debts contracted when he owned the property: consequently, this decision conflicts with rights of creditors.

§ 404. **Comparison with Previous Rulings.** How will this compare with the *Day* case? The fee simple, after condemnation, was attacked and taken for Benjamin's debt, while he was yet alive, and the purchaser at the confiscation sale was immediately divested, even of the so-called life estate. Is there a change here in the doctrine of *Day v. Micou*? and cannot the creditors of Pike now disturb Wassel, the purchaser, so far as that part of the lots which were regularly seized and condemned, are concerned? And, on the other hand, if Madame Micou had waited till Benjamin's death, and then seized the land in execution, would the curious ordeal, through which it would have passed from Benjamin to his heirs, have screened it from all mortgages or liens put upon it by Benjamin?

It is held in *Pike v. Wassel*, that "the decree of condemnation and sale, *without any doubt, vested* in the United States, or the purchaser at the sale, the interest which the person proceeded against had in the property when the seizure was made;" therefore, if that interest was a fee, the fee "*vested*." But if, by the other theory of interpretation, (of the statute and its legislative explanation construed together,) the fee was not seized or condemned, and if the courts in the *Forrest* and like cases, had exceeded their jurisdiction so far as they had decreed condemnation in excess of the life estate, then why, in this case, was not the attachment good—the attachment of the lots themselves after the United States government had seized a life interest in the lots? (*Vide* p. 713 of 4th Otto.) Yet it is held that the attaching creditors could lawfully seize and sell the fee forever of those lots upon which their seizure was prior to the government's but not so when their seizure came after, though they indeed were seizing quite a different thing.

§ 405. **Condemnation Affirmed by the Supreme Court Collaterally Reviewed.** Passing without comment, a case¹ which involved only the effect of pardon upon proceeds of confiscated property which had been covered into the treasury, we next

¹ *Knote v. United States*, (5 Otto,) 149: Field, J.

consider *Burbank v. Conrad*,¹ so far as it concerns proceedings *in rem*.

The real estate in contest in this action is part of that which was finally passed upon, and which had its *status* fixed in *The Confiscation Cases* reported in the 20th of Wallace, composed of Slidell's land and Conrad's lots. The seizure, in both cases, was that of the ground itself, (accurately described by metes and bounds and as enemy property of the confiscable class,) and all the right, title and interest therein of the person or *persons* whose property was described; the monition, in both cases, cited and admonished the owner or *owners* and all persons to appear and show cause why the described property should not be condemned; default and judgment *pro confesso* were taken against *all persons*; the decree, in both cases, condemned the property described in the libel, in exact terms.

The District Court's decrees were affirmed by the Supreme Court, in both cases, in all respects. They had both been reversed by the Circuit Court, and were thence taken to the Supreme Court.

The case of Conrad's Lots went up on two writs of error: one sued out by C. M. Conrad, (who had been allowed to appear in the District long after having been defaulted, and long after the final decision, and who had taken the case to the Circuit Court,) who complained that though the Circuit Court had reversed the decree of the District Court, it had confirmed the sale; and the other, by the United States, which complained that the District decree had been reversed.

The decision upon the writ sued out by the United States is not published; but the court said, on Conrad's writ, "We have just decided, in the case of the *United States v. Ten Lots of Ground, the Property of C. M. Conrad*, (it being a writ of error sued out by the United States,) that the judgment of the Circuit Court was erroneous, and reversed it, ordering that the decree of confiscation be affirmed."² The reporter states that this decree was rendered on the same reasons as those given

¹ 96 U. S. 291: Field, J.

² *The Confiscation Cases*, 20 Wall. 116.

in the case of Slidell. The records on file in the Supreme Court show this, and also show that the two cases were precisely alike from seizure to final confirmation of sale.

It was decided, in both, that the ground was the *res*; that the classification of confiscable property in the act of Congress was to distinguish things—not persons; that owner's names were immaterial, being useful in the pleadings only by way of property description; that the lots were “found” to belong to an enemy; that the proceedings were strictly *in rem* in all respects; that the notice to all persons and the default and judgment *pro confesso* against all persons were perfectly regular; and the District Court decree, which condemned the ground as confiscated, together with the title of *all persons*, was, by the Supreme Court, confirmed.

Here the jurisdiction of the Supreme Court was exhausted. The decree was *res judicata*. It was so against the ten lots. It was so against all persons. It was a decree of which neither the United States nor those to whom they sold could be judicially divested. It could not be attacked collaterally.

§ 406. **Confiscation Unqualified Held Contingent.** But the sons of Conrad, while he yet survived, having sued to eject Burbank, and having set up a title from their father anterior in date to the government's seizure, the court gave them the confiscated lot which had been purchased by Burbank and held that the confiscation had had reference only to the father.¹ This was in disregard of the doctrines concerning default, notice, finding of facts, enemy property, etc., previously enounced, and was clearly based upon the hypothesis that proceedings *in rem* are for the punishment of designated persons.

The contingency of the condemnation appears in this: if the property belonged to the father when seized and condemned, the decree was valid; if it then belonged to the sons, the decree was void, according to the opinion in the ejectment suit. Is not this contrary to the doctrine of the case in which it had been condemned, that even the naming of persons is immaterial,

¹ The reasons of the decision just preceding this were adopted. That case being remanded, this decided one is sufficient for discussion here.

and that owners need be mentioned only in description of the property? And to Semmes' case, in which owners were held "remediless" if they failed to appear?

Res judicata was pleaded fully, in bar of the action; the record of the confiscation proceedings was attached to the plea; it was conclusive against the property and against all persons; but the court of final resort, after having unqualifiedly affirmed the confiscation decree, sustained this collateral attack upon it, and disregarded the plea of *res adjudicata quoad omnes*.¹

The statute, sec. 7, provides: "If the property * * * shall be found to have belonged to a person engaged in rebellion * * * the same shall be condemned as enemies' property and become the property of the United States." The court *a qua* had found this fact; the Supreme Court had affirmed it: how could the collateral attack be rightfully sustained?²

§ 407. **Plea in Bar Overruled.** It was further pleaded in bar, that the plaintiffs, in the collateral attack, were of the official class of enemies whose property was confiscable. The statute, sec. 6, provides: "It shall be a sufficient bar to any suit brought by such person for the possession and use of such property, or any of it, to allege and prove that he is one of the persons described in this section;" *id est*, one that did not return to his allegiance within sixty days after the proclamation.

With commendable frankness, it had been averred by the plaintiffs that they, (the sons of the Conrad who had been the claimant before the Supreme Court in the confiscation proceedings,) had been officers of the confederate army throughout the war. No further proof was necessary to sustain the plea in bar; but it shared the fate of the plea of *res judicata*. With these extracts from the statute before us, and the decision in "The Confiscation Cases," (Slidell's land and Conrad's lots,) and the decision in Semmes' case, that an owner would be without subsequent remedy, should he not respond to monition and make claim while the confiscation proceedings were in progress with the libel averring the property to belong to another owner;

¹ For *Res Judicata*, ante, § 111; 96 U. S. 295, (3.)

² For Finding of Facts, ante, §§ 99-107

and with the settled doctrine of the conclusiveness of the decree *in rem* after general notice, it seems unaccountable that the collateral attack by defaulted persons, who avowedly had been captains in the enemy's ranks to the close of the war, could have been sustained, when not a flaw was found in the confiscation proceedings.

§ 408. **Held, That the Confiscation Sections of the Act of 1862 are to "Punish" for Guilty Acts.** Previous to the alleged conveyance, the father and the sons had "been engaged in the rebellion against the United States—the father as a member of the Confederate Congress and the sons as officers of the Confederate army; and they continued in such rebellion until the close of the war."—(96 U. S. 281, 295, 301.) The court conceded that Congress might have authorized the condemnation of the property of an enemy "without reference to the time he became such," but held that Congress had not so authorized; that the confiscation act of 1862, "so far as it related to confiscation of property, applied only to the property of persons who might thereafter be *guilty* of acts of disloyalty and treason," and "carefully excluded from its application the property of persons who, previous to its passage, may have committed such acts." They emphasize the word *hereafter*, as it repeatedly occurs in the fifth section of the act; and they hold, throughout the opinion, that confiscation is for the *act* and *offense* of holding a Confederate office or agency *after* the passage of the statute; *acting* as a Confederate army or navy officer *thereafter*, etc.; and add that the third clause of the Joint Resolution Explanatory of the act removed the only exception to the limitation, since "that resolution declared that the third clause of that section [sec. 5,] should be so construed as not to apply to any *act* or *acts* done prior to its passage."—(p. 283.)

The word "acts" in the joint resolution can mean nothing else than acts of hostility, since otherwise it would be meaningless when applied to enemy property to be condemned by proceedings *in rem*; while "*acting* as an officer of the army or navy"—[1st clause,] "*acting* as president, vice president, member of congress," etc., [2d clause,] "*acting* as governor, judge,"

etc., [3d clause,] mean *holding* such positions under the enemy; indeed, the fourth and fifth clauses substitute the latter word.

Clearly, condemnation is not for any distinct guilty act or acting, or offense, ("acts of disloyalty and treason," as the opinion has it,) for such acts must necessarily have been done in, with, or by the *res* before we could proceed against it to condemn it, even if we had a statute authorizing it, and if there were no constitutional inhibition.¹ Did the court mean for us to understand that if *Conrad's Lots* had never been transferred to his sons, they could have been condemned by the *actio in rem* for having been *used* by Conrad, the father, in "acting" as a member of the Confederate Congress?

§ 409. **Acts of Hostility.** Doubtless the statute "left the door open" for these official confederates to return to their allegiance; for the statute authorizes procedure against the enemy property held by them, only in case they should not give up their positions. The statute supplies what Judge MARSHALL found wanting in Brown's case, referred to by Judge FIELD in this.²

That those who should continue to act as official enemies subjected all their property to confiscation for its having acquired the hostile character at any time, is sufficiently clear from the text of the fifth section; and emphatically from the seventh section, which provides that if it "shall be found to have belonged to a person engaged in rebellion * * * the same shall be condemned as enemies' property and become the property of the United States."³

And the resolution relied upon by the organ of the court, fully confirms this view: "*Resolved*, etc., that the provisions of the *third clause* of the fifth section of 'An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for other purposes,' shall be so construed as *not to apply* to any act or acts done prior to the passage thereof, nor to include any member of a State legislature, or judge of any State court, who has not, in accepting or

¹ Opinions of Judge Field in *Miller v. United States*, 11 Wall. 292, and in *Tyler v. Defrees*, Id. 331.

² *Brown v. The United States*, 8 Cr. 110.

³ 12 Stat. at L., p. 591.

entering upon his office, taken an oath to support the constitution of the so-called 'Confederate States of America;'” etc.¹ As the exception proves the rule, the other clauses of the fifth section *shall be construed to apply* to acts done prior to the passage of the statute; *id est*, acts of hostility by an enemy imputing hostile *status* to his property.

§ 410. **Exception to Retroaction.** But it shall not apply at all to loyal judges of State courts and loyal members of State legislatures, who have not taken the Confederate oath. Thus it limited the relief, under the exception, to those who were already in office when the insurrection broke out, and who may have held on to their positions from a sense of duty to the loyal people in their communities; for all new judges and legislators would have been sworn into office under the Confederate oath.

This view of the resolution recognizes the general doctrine of retroaction, subject only to the exception of the third clause of the fifth section of the act. The decision, as delivered, (before the opinion was revised, as now published in the reports,) rested on the statement that the resolution made the whole act exceptional to the general doctrine of retroaction. It would seem that when it was noticed that only one clause was thus made exceptional, and that the case did not come under that clause, the conclusion should have been revised.

The nominal changing of the title from one enemy to another, (with delivery impossible,) prior to the passage of the statute, was made the ground for disregarding the condemnation of the land under the fact, (previously judicially found,) that it belonged to the father; and for disregarding the judgment of default against the sons which had rendered them remediless for not claiming in response to notice.

§ 411. **Held, That the United States Obtained No Title Whatever when Conrad's Lots were Condemned.** The cases of Pike, Wallach and others like them, (though collateral, jurisdictionless and void) accord with the established doctrine that confiscation divests the title of the former owner and vests it in the United States, if we eliminate incongruous matter; but

¹ 12 Stat. at L., 627.

Burbank v. Conrad is to the effect that, notwithstanding a decree of condemnation and the defaulting of all non-claimants, the United States may obtain no title whatever, either in fee or for the life of the former owner, and can convey none to a purchaser.

Instituted while the father, (former claimant,) was alive, the collateral case last mentioned differs from several brought by the heirs of Slidell, against several purchasers, after his death.¹ The latter have been decided on principles directly opposite to those on which "Slidell's Land" was finally confiscated irrespective of his special proprietorship; and, in this, they accord with the former, it is true; but the purchasers had been allowed to hold during his life, on their warranted titles "to have and to hold forever."

§ 412. **The True Doctrine Again Advanced.** The next case to be noticed,² a case originally brought by Semmes to recover a lot which had not been confiscated, though erroneously conveyed to Burbank by the United States marshal, with other lots which had been, the Supreme Court treat largely of confiscation proceedings under the act of 1862, fully adopting the true theory, and using terms and arguments wholly inconsistent with the hypothesis governing the cases just noticed.

§ 413. **"Separation of Estate" (?) by Condemnation.** Wade's land was confiscated and sold,³ and he bought it himself at the confiscation sale. Afterwards he sold it to French. Upon Wade's death, his heirs sued French for the land, notwithstanding the derivation of the latter's title from their father, his immediate vendor; and also from the United States in whom the land had been vested by the final decree of a competent court which had had sole jurisdiction of the subject matter. No writ of error had ever been taken from the United States District Court, at New Orleans, which rendered this final decree in 1865;—some fifteen years before the collateral attack upon it was sustained by the Supreme Court.

French, having had an ejectment suit brought against him

¹ Not reported.

French v. Wade, 12 (Otto,) 102 U.

² Burbank, Plaintiff in Error, v. S. 132: Waite, C. J.
Semmes, (9 Otto,) 99 U. S. 138.

by the heirs of Wade, his vendor; and having had that suit decided against him, became plaintiff *in error*.

"By the condemnation and sale, Wade's estate was separated entirely from that of his heirs after his death, and the heirs are not estopped by his warranty from asserting their title," said the Supreme Court.

The estate was Wade's *in fee* before condemnation; what was condemned, he had bought back; what was not condemned, he had retained; all he then conveyed to French *in fee* by deed, with full warranty. What is *meant* by the court, when they speak of the "estate" and "title" of Wade's *heirs* as separated from the "estate" and "title" of Wade, their father?

What separation, during his life, was possible, if the property was to *descend* as "an *inheritance*" (as the court say,) "after his death?"

This separation of *estate* and *title*, between two parties, viz.: the ancestor and the inheritors, is hopelessly confusing. The relations of the parties are confounded: for, if the separation took place "by the condemnation and sale" of the land, (as the court say,) what were the "inheritors" but owners of a part? What part did the ancestor have? And what the inheritors? And did the relation of ancestor and heir still continue?

The "sale" coupled with "condemnation" is the sale by the United States to Wade: not that by Wade to French, though precisely the same real estate was conveyed in both. We mention it, not to distinguish between the two sales, but to show the time when the separation of *title* and *estate*, between Wade and his children, took place. "By the condemnation and sale, Wade's estate was separated entirely from that of his heirs after his death:" could they still be heirs to his part? No, for that would cease with his life. Could they, thereafter, be *heirs* to any other part? At the time of that condemnation and sale, did an immediate division of Wade's land, or of his title thereto, take place between him and his children? Did they then, immediately "inherit" from a live man? Or, did they, at his death, inherit what he had not?

§ 414. What is, and What is not Condemned, United in One Owner. If Wade, owner by *fee simple* title before condemna-

tion, (as is admitted,) bought all that was condemned and sold, thus having the *fee* whether it had been confiscated or not; and then sold full title with warranty to French, how can the court seriously say "the heirs are not estopped from asserting their title?" Can they possibly have any title to this land by "inheritance," unless derived from their father? And could their father sell the land and take the price, and yet transmit it to his children?

Nemo plus commodi heredi suo relinquet quàm ipse habuit. No one can leave a greater benefit to his heir than he had himself. Dig. 50, 17, 120. *Nemo plus juris ad alienum transferre potest, quàm ipse habet.* One cannot transfer to another a larger right than he himself has. 1 Coke Litt. 309.

If Wade had no right to sell more than the estate's use for the period of his own life, (as the court say in the beginning of the paragraph from which we have quoted,) was it because he did not own anything more? If so, how could his children be his "heirs," and take anything as an "inheritance?" If not so, had he been, by the condemnation of his land, so personally incapacitated that he could not convey to French what was his own?

§ 415. **Was the Citizen Enemy "Incapacitated?"** Here crops out the theory that we have seen, from time to time, while following the meandering path of this judicial exposition of the statute of 1862: the theory of criminal prosecution for treason. Wade was blackened—incapacitated—partially attainted, if he could not sell his own. It was a peculiar attain, unknown to the jurisprudence of England,—still he was partially shorn of his civil privileges and citizenship, if the land was really his own, yet he was incapable of selling it.

Where did the court find law or constitutional warrant for this? Where did they find authority to say that a man cannot sell what he yet may bequeath? Or do they mean to go so far as to say that Wade could not make a will affecting the inheritance? Do they hold that, though all not incapacitated citizens may either transmit their property by testament, or transmit it by operation of law, this citizen was so incapacitated that his

property could descend from him to his heirs only by the latter means?

Attainder, in the slightest form, finds no legal warrant in this country. Even if the proceedings *in rem* were personal prosecutions for treason, there is yet no authority for partially attainting, or for incapacitating the traitor. Yet, the court say, "as to him, the forfeiture was complete and absolute; but the ownership, after his death was in nowise affected, *except by placing it beyond his control while living.*" If he had ownership, why had he not control, unless he was personally incapacitated?

No statute expressly authorizing such incapacitating of a citizen would be deemed constitutional: can a "joint resolution explanatory" of a statute be constitutional if it authorizes such a thing? Yet, the court rest upon that and say, as they had said before, that it was "intended for the benefit of his heirs exclusively, to enable them to take the *inheritance* after his death." The idea here is that the title remained in the ancestor to be inherited by his heirs, but that, by reason of the congressional explanation of a statute, the control of the property with the right to sell it was taken away from him. If, by an explanatory resolution, or even by a statute, Congress can take one man's property and give it to another, then may a father's property be so fixed as to be secured by law to his children in spite of himself and his creditors: not otherwise.

§ 416. **Eliminating Error, the Condemnation Must be Deemed Absolute.** There is another side to this brief decision of *French v. Wade*. Since, by the "condemnation and sale" of Wade's land, "there was left in him no estate or interest of any description which he could convey by deed, and no power which he could exercise in favor of another," it logically follows that his *fee simple* title was condemned and sold. Since, "as to him the forfeiture was complete and absolute,"¹ it logically follows that the forfeiture was unqualifiedly complete and absolute—no other having any interest—the *fee* having been in him. Since he bought at the confiscation sale what had been condemned, it logically follows that he re-acquired his *fee simple*

¹ For Absolute Condemnation, see ante, §§ 109-111.

title to the land. Since he sold this land with this title to French, it follows further, that his heirs could not inherit it from him¹

¹ Post, § 453.

CHAPTER XXXIX.

TITLE VESTED IN THE UNITED STATES.

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§ 417. **First Held That Condemnations Were Restricted.** There has been complete change of ground with regard to the effect of the "Joint Resolution Explanatory of an act entitled 'An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for other purposes,'" so far as concerns the *condemnation* of enemy property.

When the ejectment suit brought by the heir of an enemy whose property had been confiscated against the purchaser of the property, brought by Douglass Forrest against Bigelow, was taken by the latter, as plaintiff in error, to the Supreme Court, it was held that only the life estate of French Forrest, (father of Douglass,) had been lawfully condemned. It was held that the joint resolution prohibited the condemnation of the land in fee. It was held that the District Court, in condemning the fee, had exceeded its jurisdiction. It was held that a State court of Virginia, and the Supreme Court of the United States, could exercise jurisdiction of the ejectment suit on the distinct ground that the decree of confiscation, so far as it went beyond the condemnation of the life estate, was absolutely null and void. It was held that there had been excess of jurisdiction exercised by the District Court in condemning more than the life estate.¹

¹ That this was the sole ground found jurisdiction to review the upon which the Supreme Court proceedings *in rem* in a collateral

This decision was that the joint resolution limited the condemnation; it was on the subject of the condemnation, not upon that of the sale, except that the sale of the uncondemned *fee* was held null as a consequence.¹

§ 418. **Reversed: Condemnations Unlimited.** But, in *Wallach's Heirs v. Van Riswick*,² the Supreme Court decided precisely the opposite upon this point. They expressly overruled *Bigelow v. Forrest*, on the point on which that case had turned: the effect of the resolution upon condemnation. They admitted that decision to have been erroneous so far as it concerned the condemnation, and now relegated the resolution to the sale.

Wallach, the father, thinking only his life interest had been lawfully condemned, had subsequently sold the *fee*; but, in the suit of his heirs to evict the purchaser, (who had bought both what Wallach sold and what the United States had sold,) the Supreme Court held that by reason of the condemnation, nothing, thereafter, had remained in Wallach. They held now that the District Court in Washington had not exceeded its jurisdiction in condemning the *fee*. They said, "We are not called upon to determine where the *fee* dwells * * * whether in the United States or the purchaser. * * * That it cannot dwell in the offender, we have seen, is evident; for if it does, the plain purpose of the confiscation act is defeated, and the estate confiscated is subject alike in the hands of the United States and of the purchaser to a paramount right remaining in the offender. If he is a tenant of the reversion, or of a remainder, he may control the use of the particular estate, at least so far as to prevent waste. That Congress intended such a possibility is incredible."

If the *fee*, by reason of the condemnation, is either in the

suit, appears from the statement by them, in *Ex parte Lange*, 18 Wall. 163, in which they say that because the District Court had exceeded its jurisdiction in the case of *United States v. Forrest's Land*, by condemning more than *Forrest's* life interest, though he owned the *fee*, that case was reviewed in the collateral one

of *Bigelow v. Forrest*.

¹ The decision was based on the idea that the proceeding had been personal, and to punish for treason, to the neglect of the long-settled doctrine that all actions *in rem* are civil. See Ante, § 25, and authorities there cited.

² 2 Otto, 202.

United States or the purchaser, there can be no question that it is in the former during the period between the condemnation and the sale, when there is no purchaser existent. This accords with the previous case of *Semmes v. The United States*,¹ a confiscation case of which the Supreme Court had undoubted jurisdiction, in which they held: "Properties condemned as forfeited to the United States, under the aforesaid act of Congress, [the Confiscation Act of 1862] *became the property of the United States* from the date of the decree of condemnation, 12 Stat. 591, sec. 7. Judgment of forfeiture was rendered in this case on the 5th of April, 1865, and the land in question became, from that date, the property of the United States; * * * the title to the land was lost to him, [Semmes,] when it became vested in the United States." * * * "Beyond doubt, the original decree of the District Court was complete and correct."

The Wallach case had not only been preceded by *Semmes*', but by several others in accord on the subject of condemnation; and it has since been reaffirmed in *Chaffraix v. Schiff*,² and in others; especially in *Pike v. Wassel*,³ professedly modelled upon it, in which it was held that the condemnation of Pike's land, "without any doubt, vested [it] in the United States or the purchaser." Finally, in *French v. Wade*,⁴ the Supreme Court held that after the condemnation of Wade's land, "there was nothing left in him, no estate or interest of any description, which he could convey by deed;" that "as to him, the forfeiture was complete and absolute;" and that "the cases of Wallach and Pike govern this case."⁵

¹ 1 Otto, 21.

² 2 Otto, 214.

³ 4 Otto, 711.

⁴ 12 Otto, 132.

⁵ The jurisdiction to condemn the land being conceded in these and like cases, the law presumes that all the necessary facts were found, and will admit no evidence to rebut the presumption. *Foster v. Milliner*, 50 Barb. 393, 394; *United States v. Dawson*, 101 U. S. 569; *Orr v. Thomas*, 3

La. An. 582; *Le Quen v. Gouverneur*, 1 John. Cas. 436; *Canfield v. Monger*, 12 John. 347; *Davis v. Talcott*, 12 N. Y. 184; *Gilman v. Horseley*, 5 N. S. (Martin, La.) 664; *Aurora City v. West*, 7 Wall. 82; *Green v. Van Buskirk*, Id. 139; *Beliot v. Morgan*, Id. 619; *Comparet v. Hanna*, 34 Ind. 74, 77; *Donohu v. Prentiss*, 22 Wis. 311, 316; *Herrett v. Yanders*, 34 Ind. 102; *Succession of Tilghman*, 7 Rob. (La.) 393; *Patterson v. Bon-*

§ 419. **Joint Resolution Held not to Limit Confiscation.** It is clear that, on the subject of *condemnation*, the doctrine of *Bigelow v. Forrest*¹ has been perfectly overturned. The joint resolution is now held *not to limit* confiscation of land to the life estate of the owner.

Although the reversal of the doctrine of that case concerning condemnation is the admission of the United States District Court's jurisdiction to condemn the land; and is, therefore, the cutting off of any right of any higher court to review the decree of condemnation collaterally, thus rendering *Bigelow v. Forrest coram non judice*; and although the other ejectment suits cited are in the same predicament, yet we have thought it not improper to refer to them in treating of the judicial exposition of the explanatory resolution. But it is enough to say that Semmes' case² settles the question that the fee of land may be condemned without violating the legislative explanation or the Constitution, and the decision in that case is unquestionably authoritative.³

§ 420. **Inheriting Confiscated Property.** Notwithstanding the inapplicability of the resolution to condemnations, as now fully settled, it is yet held, (in the jurisdictionless ejectment suits only) that by virtue of that resolution the heirs of bereft enemy owners inherit the condemned property from those owners.

Since the court say that the *heirs* take the confiscated property by reason of the explanatory resolution, we look to it to find authority therefor, express or implied. Finding none after the admission that condemnation is unrestricted, we turn to the decisions to learn how the court found any; and we read that

ner, 14 La. 214; *Buchanan v. Riggs*, 2 Yates, 233, 234; *Att'y Gen'l v. Norstedt*, 3 Price Ex. 97.

¹ 9 Wall. 339.

² 91 U. S. 21.

³ This case accords with the first part of *Wallach v. Van Riswick* in treating the property as enemy property, thus cutting off the treason limitation. The settled doctrine is

in accord: *Rose v. Himley*, 4 Cr. 272; *The Santissima Trinidad*, 7 Wheat. 306; *Brown v. United States*, 8 Cr. 121; *The Andromeda*, 2 Wall. 481; *The Venus*, Id. 258; *The Sallie Magee*, 3 Wall. 451; *The Hampton*, 5 Wall. 375; *The Amy Warwick*, *The Crenshaw*, *The Hiawatha* and *The Brilliance*, 2 Black, 636; *McCulloch v. State of Md.*, 4 Wheat. 413; *The*

the heirs are the persons the resolution was intended to benefit.¹ Can the court mean that land, after being confiscated to, and vested in, the United States, must have its title in fee retained by the United States for the heirs, and that there is an implied grant from the government to them, contained in the resolution? Clearly, if the title is vested in the government, and not sold to the purchaser at the confiscation sale, there is no way to convey the title from the government to the heirs, but by grant. But such is not the exposition. As *heirs*, they take, say the court. As an *inheritance* the land descends, they say. It is not from the United States, though vested with the title, that the enemy's heirs receive title. It is from the enemy, though divested of title, that the heirs inherit title.

The rulings of the court in this regard are not mis-stated. The purchaser, and what he may have purchased, are now left out of the question. It is not now inquired whether the joint resolution is a limitation of the nation's selling power over what it owns. It is conceded, for argument sake, that only the usufruct of property for an uncertain term is sold. The exposition of the resolution is now confined to condemnations and the subsequent inheriting of confiscated titles by the heirs of those judicially bereft of their titles. And, the ruling of the court is to this effect: Heirs may inherit property from one who has alienated it by forfeiting it—may inherit while the title to that identical property is in the United States.

Such a proposition cannot be argued any more than one could discuss the assertion that title to property could be wholly in one man, and yet wholly in another; *i. e.*, that a thing can be in two places at the same time. We look in vain to the joint resolution "intended for the benefit of the heirs," to find any method

Ouachita Cotton, 6 Wall. 521; The Cotton Plant, 10 Wall. 577; Union Ins. Co. v. United States, 6 Wall. 765; United States v. Hart, Id. 772; Morris' Cotton, 8 Wall 507; Slidell's Land, 20. Wall. 92; Conrad's Lots, Id. 117; Miller v. United States, 11 Wall. 292; Osborne v. United States,

Id. 474; Grotius' *De Jure Gentium*, Lib. iii, c. vi; Id. c. ii, § 2; Vattel's *Droit des Gens*, Liv. ii, c. vii, §§ 81, 82; Bynkershoek, Lib. i, c. vii; Puffendorff, Lib. i., 8, c. vi.; Martens' Laws of Nations, Lib. viii, c. iii, § 9.

¹ Wallach v. Van Riswick, 92 U. S. 202.

by which the government's property can be inherited from some other owner.¹

§ 421. **Rulings as to the Incapacity of those Divested of Title.** In the exposition of the resolution, the court have repeatedly treated the person from whom property has been taken and confiscated, as one incapacitated. Wallach, Pike and Wade were declared by the court to have been incapacitated; rendered incapable of exercising powers which their successors could exercise by derivation from them. We find no sanction of such ruling either in the resolution or the clause of the Constitution which it repeats. The spirit of both is, that forfeitures, following convictions of treason, should not work incapacity.

Granted that the Supreme Court, in several of the ejectment suits, have confounded civil proceedings *in rem* with criminal prosecutions for treason—hostile things with guilty things—the confiscation sections with the criminal sections of the act of 1862,—still, under such constructions, the “Joint Resolution Explanatory,” and its antecedent in the Constitution,² rather inhibit attainder in the slightest form, than authorize it. If the court understands that *incapacity* is included in the “punishment” of “the offender,” mentioned in the resolution, and that such “punishment” is not to extend “beyond his natural life,” we must turn from the resolution to the act itself to help us to their meaning. And we find, in the criminal part of the act, sec. 3, that “every person *guilty* of either of the *offenses* described in this act, [treason and inciting rebellion,] shall be forever incapable and disqualified to hold any office under the United States.”³ No one has been convicted of either of the offenses under the act; and, had Wallach, Pike, Wade and

¹ How inconsistent all this appears when we reflect that proceedings *in rem* cannot be against any personal defendant. *United States v. 84 Boxes of Sugar*, 7 Pet. 450; 200 Chests of Tea, 9 Wh. 430; *McIlvaine v. Cox's Lessee*, 4 Cr. 209; *Barancoat et al. v. Gunpowder*, 1 Met. 230; *Markle v. Akron*, 14 Ohio, 590, 591; *The Palmyra*, 12 Wh. 12, 13, 15; *United*

States v. Bags of Coffee, 8 Cr. 398; *Pipes of Distilled Spirits*, 5 Sawyer, 421; *The Whisky Cases*, 99 U. S. 594; *Dobbins' Distillery*, 96 U. S. 395; *Three Tons of Coal*, 6 Bissell, 379; *The Confiscation Cases*, 20 Wall. 104, 105.

² Art. 3, § 3, cl. 3.

³ 12 Stat. at L., p. 590.

others been so convicted, the incapacity would have had reference to office-holding only. Yet, this section 3 is the only expression throughout the whole statute which has any allusion to incapacity, and therefore we are necessitated to conclude that it is to this the court had reference when treating of incapacity as a part of the "punishment" of the "offender" which, with "forfeiture," was not to extend "beyond his natural life," and which, under their theory, might therefore be understood to exist during life.

The better view seems to be that those enemies could not have control of their former property for the reason that they had ceased to own it after the lawful condemnation of it, and the divestiture of their title, and the vesting of it in the United States. They seem not to have been incapacitated from holding office under the United States, nor to have been denied any rights as citizens and property owners. The reason they were incapacitated from the administration of the confiscated property, is a general one, applicable to all persons with reference to property which they do not own.¹

§ 422. **The New Title is Vested in the United States.** The two positions cannot stand together: (1.) That the title of confiscated property is vested in the United States; and (2.) That the title of the same property is transmissible from divested and incapacitated fathers to their children.

With the highest deference for the doctrine, *stare decisis*, the inquirer is driven to put aside one of these propositions. He

¹ It cannot be possible that any person can be incapacitated with regard to the transmission of his property to his heirs, by any proceeding *in rem*, since such proceeding is not against any person, § 420, note. Besides, the condemnation of the thing proceeded against is conclusive with regard to his heirs as well as to himself. *Woodruff v. Taylor*, 20 Vt. 65; *Lord v. Chadbourne*, 42 Me. 429; *Cammell v. Sewell*, 3 Hurl. & N. 617; *The Railroad v. Hemphill*, 35 Miss. 17; *Rose*

v. Himely, 4 Cr. 291; *Crondson v. Leonard*, Id. 434; *Bradstreet v. The Neptune Ins. Co.*, 3 Sum. 600; *Penhallow v. Doane*, 3 Dallas, 54; *Hudson v. Guestier*, 4 Cr. 295; *Certain Logs of Mahogany*, 2 Sum. 600; *Maggee v. Beirne*, 3 Wright, 50; *Imrie v. Castrique*, 8 C. B. N. S. 1, 405; *The Globe*, 2 Blatchford, (C. C. Rep.) 427; *Thompson v. St. Bt. Morton*, 2 Ohio State, 36; *The Robert Fulton*, 1 Paine, 620; *Scott v. Sherman*, 2 Wm. Black 982.

finds the latter untenable, and follows the Supreme Court in the former.

It is settled by the Supreme Court that condemnation is not confined to life estates; that the joint resolution does not restrict the condemnation of enemy property; that all title previously vested in the enemy owner is divested by the condemnation, and is vested in the United States.¹

¹ *Miller v. United States*, 11 Wall. 292; *Tyler v. Defrees*, Id. 331; *Brown v. Kennedy*, 15 Wall. 591; "The Confiscation Cases," 20 Wall. 116; *Semmes v. United States*, 91 U. S. 21; *Wallach v. Van Riswick*, 92 U. S. 202, (overruling *Bigelow v. Forrest*, 9 Wall. 339. and *Day v. Micou*, 18 Id. 160, on life estate condemnation;)

Pike v. Wassel, 94 U. S. 711; *French v. Wade*, 102 U. S. 132. See authorities on conclusiveness of condemnation decree, ante, §§ 111, 112; on what is the *res* in absolute condemnations, §§ 36, 41; on the final rejection of all interests not presented, § 97

CHAPTER XL

TRANSFER OF TITLE BY THE UNITED STATES.

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§ 423. **The Conflict of Decisions Confined to Sale.** It is settled that land is confiscable under the act and joint resolution. The decisions agree in this. Both classes of cases—the confiscation proceedings and the ejectment suits; the proceedings *in rem* and the collateral actions, now agree as to condemnation. The early cases, of the latter class, have been overruled so far as they were not in accord with this conclusion. Now the doctrine is that nothing is left in the enemy, of confiscated property previously owned by him; nothing left in him that he can use or in anywise convey; nothing whatever "left in him;" the *fee* not left in him, but condemned to the United States.

The conflict between the two classes of decisions is now narrowed to the sale. The doctrine of the ejectment suits is that

only the life estate of the enemy is sold by the government; while that of the confiscation cases is that the proceedings from seizure to the new title are precisely as in all confiscations of enemy property.

It is a singular fact, and one very important to be noticed, that in all the conflicting decisions on this subject, those upon proceedings *in rem* were based upon the evidently correct doctrine that the actions are against enemy property under the law of nations; while those upon the ejectment suits were decided upon the hypothesis that those proceedings were to punish offenders under municipal law, with the exception of *Tyler v. Defrees*, though there are occasional expressions to the contrary in some others of these suits.

The two classes of decisions are finally brought together and reconciled so far as condemnation of land *in fee* is concerned, but not as to sale after condemnation. On this latter point, both cannot be accepted as law.

The government's right to dispose of what has been adjudicated to it, is so well grounded upon general principles, so well sustained by general legislation, and so plainly prescribed by the confiscation act of 1862, that the doctrines enounced in the proceedings *in rem* under the act must be preferred to the counter rulings in the collateral attacks upon those proceedings.

§ 424. **Property Acquired by Confiscation may Ordinarily be Held or Sold.** Whenever a private citizen is finally adjudged the owner of property, he may retain or sell it at his pleasure. So may corporations. So may governments, except that statutes usually require sale where retention for national use is not deemed necessary. Property condemned under the revenue laws, the navigation laws, the slave-trade laws, etc., is, by statute, required to be sold; and confiscated naval prizes must be sold, unless needed for government purposes, when they may be appraised and retained, pursuant to regulations adopted by Congress. Other confiscated property is subject to the general rule, that it must be sold, except that it was provided in the statute establishing the Freedmen's Bureau,¹ that the commissioner,

¹ Act March 3, 1865, 13 Stat. at L. 507; *Titus v. The United States*, 20 Wall. 477.

under the direction of the President, might set apart for the use of loyal refugees and freedmen, tracts of land within the insurrectionary States, to which the United States should have acquired title by confiscation. This is a modification of the law with regard to confiscation sales, and is amendatory. While the acts of July 13, 1861,¹ and August 6, 1861,² do not specially provide how hostile property, (condemned thereunder so far as authorization to proceed was requisite,) should be sold, that of July 17, 1862,³ does. All property, real and personal, condemned to the government, under the last mentioned act, is positively required to be sold for the support of the army; and it has received no modification except as stated above, under the act creating the Freedmen's Bureau, which authorized the retention of such portions as might be ordered by the President of the United States to be set apart for freedmen and refugees, and finally sold to them.

§ 425. **But Property Confiscated Under the Act of 1862, must be Sold, unless Retained under the Act of 1865.** The act, with regard to sale, is that if property, "whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid and comfort thereto, the same shall be condemned *as enemies' property* and become the property of the United States, and may be disposed of as the court shall decree and the proceeds thereof paid into the treasury of the United States for the purposes aforesaid." * * * "The several courts aforesaid shall have power to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshals thereof where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of this act, and vest, in the purchasers of such property, good and valid titles thereto."⁴

In other words, confiscated land must be sold under "good and valid title," "*vested*" in the "*purchasers*." What is condemned must be sold. Land condemned *in fee*, must be conveyed to the purchaser *in fee*. Usufruct of land for a term

¹ 12 U. S. Stat. at L. 255.

² Id. 319.

* Id. 589, §§ 5, 7, 8.

⁴ 12 Stat. at L. 591, §§ 7, 8.

of years, condemned as such, must be conveyed as such. Intangible things condemned to the government, must be sold and conveyed as such. The "deeds and conveyances" "where *real estate* shall be the subject of *sale*, must be executed by the United States marshals, so as to "*vest* in the purchasers" "good and *valid titles*."

Lands under *fee simple* title have been condemned under this act, and become wholly the property of the United States, as decided by the Supreme Court in all their decisions adjudicating confiscated real estate. The legislative department of the government, (the only department that could make provision without usurpation of power,) has as positively enacted that the fee of enemies' landed property shall be sold, and vested in the purchaser, as that it shall be confiscated, and vested in the United States, in the first instance.

Under this act, "and the joint resolution of even date," the Supreme Court have held, in their adjudications upon confiscated property brought before them by writ of error, and also in the collateral attacks upon those adjudications, the *fee* of the fee-holder is condemned wholly to the United States, so that "there is nothing left in him;" the *fee* not left in him.¹

§ 426. **District Courts have Jurisdiction to Order Sale.** Had the United States District Courts, which condemned real estate *in fee* to the United States, jurisdictional authority to make judicial order for the sale of what they had finally condemned?

Those courts "shall have power," says the eighth section of the act, "to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances to be executed by the marshals thereof where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of this act, and vest in the purchasers of such property good and valid titles thereto."

This is a plain, unequivocal, exhaustive answer to the question.

Under this jurisdictional authority, the District Courts have habitually made all the necessary orders respecting sale in the

¹Ante, § 422, and authorities cited.

cases that have been before them; issued, in each case, the writ of *venditioni exponas*; caused, by order, the cancelling of all recorded liens and mortgages which had not been asserted by way of intervention against the proceeds; ordered the appraisement of the property condemned, (so ordered in Louisiana by the court sitting in New Orleans, with the restriction that the marshal should not adjudicate property upon any bid less than two-thirds of the appraisement, at the first offering, in accord with the law of that State;)¹ confirmed the sales by judgment of distribution, and directed "deeds and conveyances to be executed by the marshal" to the purchaser, "where real estate" was "the subject of sale," so as "to vest in the purchaser of such property," "good and valid title." In accordance with such judicial orders and the decree, the marshal in the name of the United States, deeded to the purchaser of confiscated real estate, the land *in fee* simple title, "to have and to hold, with all the buildings, improvements, rights, ways, etc., unto him, his heirs, administrators, executors and assigns, to their proper use, benefit and behoof forever."

§ 427. **Execution of the Order, and its Effect.** That, in accordance with judicial orders, authorized by the statute, the marshal advertised the condemned lands to be sold in fee; that they were so sold and titles given, and the sales duly confirmed, appears in the records of the several cases that were before the Supreme Court on writs of error; and in the records of those cases filed in evidence to support the pleas of *res adjudicatæ* made in the ejectment suits; and, in those cases, heretofore mentioned, which were never removed to the Supreme Court, the records show like advertisements, sales, conveyances and confirmations.

That the District Courts had jurisdictional authority thus to make the sales is settled by the affirmation of the proceedings in the cases that were removed to the Supreme Court.

By the sales, the purchasers succeeded to the government's position. They acquired the same rights in the decrees of con-

¹ See form of order, Post, Chap. liii., Liens, by authorizing Interventions
in "The act of Congress to Protect under the Insurrection Laws."

demnation which the government had had before selling. Their titles rested upon those decrees. They were not bound to look beyond those decrees.¹ Those decrees could not be disturbed without affecting the purchasers, any more than they could have been, before sale, without disturbing the government's vested rights. The fact, that such decrees were *res adjudicatæ* as to all persons, before the sale, remained a fact after the sale.

§ 428. **Jurisdiction to Sell what was Condemned, Never Questioned by Litigants.** The plaintiffs, in the ejectment suits, did not base their action, in any case, upon any alleged excess of the exercise of jurisdiction by the United States district judge, in his orders of sale, nor upon any errors of sale or of the marshal's returns; nor did they charge any excess of jurisdiction by the judge in his judgment of distribution and consequent confirmation of sale; nor was there any attack upon the title given by the marshal, under the order of court and the authorization of the statute, as to its form and fullness as a conveyance to the purchaser, "his heirs, administrators and assigns forever."

If, in any of those cases, the judge had not exercised all his jurisdiction over the *res* in the matter of its sale, after it had become the property of the United States; if he had ordered the sale of a part instead of the whole; of a life interest, instead of the *fee*; of an intangible interest appertaining formerly to some particular person, instead of the condemned *res* itself, the unsold portion would manifestly have remained the property of the government. It would have been condemned, but not sold. In such case, it would not have availed the plaintiff, in a suit to eject the purchaser, to show that less than what was condemned had been sold; for, by what process of ratiocination could such a state of things benefit him?

§ 429. **The Explanatory Resolution does not Refer to Sale.** The court took a new departure, in the case of *Wallach v. Van Riswick*, from the course of the previous ejectment suits.

¹ *Voorhies v. Bank of the United States*, 10 Pet. 449; *Grignon's Lessee v. Astor*, 2 How. 341; *Foulke v. Zim-*

merman, 14 Wall. 113; *McNutt v. Turner*, 15 Wall. 365. See *Ante*, §§ 121-132.

They therein admitted that the District Courts of the United States had jurisdiction to condemn real estate unqualifiedly to the United States, but held that the exercise of jurisdiction, in ordering its sale, was limited to the life estate of the previous owner. The decisions in the subsequent ejectment suits are modelled upon that of Wallach. The sole reason for this limitation of the exercise of jurisdiction to sell what is condemned is found thus stated by the court: "The joint resolution passed contemporaneously with the approval of the act, was intended for the benefit of his, [the late owner's] heirs exclusively to enable them to take the inheritance after his death."

Previously the court had understood the resolution to limit the *forfeiture*, as they had held in *Bigelow v. Forrest*, and the subsequent cases modeled upon it. Now they admit that there was no excess of jurisdiction by the District Courts in pronouncing forfeiture of lands in fee,¹ but that the excess was in the selling of the fee.

§ 430. **The Resolution Expressly is on the Subject of Forfeiture.** It has been shown heretofore that the "work forfeiture" mentioned in the "Joint Resolution Explanatory," is referable and adaptable only to the fine which worked forfeiture under the criminal sections of the act; but if it has reference and adaptability to the confiscation sections, the limitation would

¹ The District Courts which pronounced the decrees of confiscation are thus conceded to have been clothed with jurisdiction over the subjects-matter of the proceedings; and their decrees were therefore final if not removed to an appellate court. *Goodman v. Niblack*, (12 Otto,) 102 U. S. 556; *McKeever v. Ball*, 71 Ind. 398, 406; *Worthington v. Duncan*, 41 Ind. 515; *Goodman v. Niblack*, 102 U. S. 556; *Grignon's Lessees v. Astor*, 2 How. 338; *Beauregard v. New Orleans*, 18 How. 502; *Shriver's Lessee v. Lynn*, 2 How. 43, 60; *United States v. Aredondo*, 6 Pet. 709; *Voorhies v. Bank of the United States*, 10 Pet. 474; *State of Rhode*

Island v. State of Mass. 12 Pet. 718; *Florentine v. Barton*, 2 Wall. 216; *Comstock v. Crawford*, 3 Wall. 404; *Callen v. Ellison et al.*, 13 Ohio State, 452; *Sheldon v. Newton*, 3 Ohio State, 494; *Shroyer v. Richmond*, 16 Ohio State, 455; *Wilder v. City of Chicago*, 26 Ill. 182; *Dequindre v. Williams*, 31 Ind. 456; *Smiley v. Samson*, 1 Neb. 56; *McKeever v. Ball*, 71 Ind. 398, 406; *Mulford v. Stalzenback*, 46 Ill. 307; *Worthington v. Duncan*, 41 Ind. 515; *Morse v. Gould*, 11 N. Y. 281; *Jackson v. Babcock*, 16 Id. 246; *Gibson v. Roll*, 30 Ill. 172; *Johnson v. Johnson*, Id. 215; *Goudy v. Hall*, Id. 109; *Mason v. Messenger*, 17 Iowa, 268.

apply to the condemnation of property, (as formerly understood by the Supreme Court,) and not to the sale after condemnation. The language of the congressional explanation is, "Nor shall any punishment or proceedings under said act be so construed as to work a *forfeiture* of the real estate of the offender beyond his natural life." The language is not *sale* but *forfeiture*. The limitation is not applicable to the District Court's jurisdiction to sell what has been forfeited, but to the jurisdiction *to decree forfeiture*, if the applicability of the explanatory resolution to the confiscation sections be conceded, and if it be indeed a *proviso* to the law.

§ 431. **Limitation of Jurisdiction to Sell is not Implied.** Were there limitation of jurisdiction to condemn, there could be no sale in excess of the condemnation; but, since it is held that there is no limit to condemnation, we look in vain for any implication limiting the sale of whatever is forfeited. We cannot substitute "sale" for "forfeiture" in the explanatory sentence; we cannot rationally speak of "punishment" and "proceedings" *working* "sale;" nor can we coherently speak of "sale" *working* "forfeiture."

There is no allowable transposition of the terms of the resolution which will give color to such implication. Restriction of sale does not seem to have been conveyed by the words or sense of the resolution, for several years after the explanation was made—not, indeed, till the Wallach case was decided. Always before, the restriction had been applied to forfeiture.

§ 432. **Forfeiture is Already Complete Before Sale.** The title of the condemned land is already vested in the United States, before the District Court exercises its jurisdiction to sell it.¹ After the sale, it is "either in the United States or the

¹ And all unpresented claims and titles are thus barred. *Beliot v. Morgan*, 7 Wall. 619, 621, 623; *Aurora City v. West*, Id. 82; *Green v. Buskirk*, Id. 139; *Cooper v. Reynolds*, 10 Wall. 308; *The Santa Maria*, 10. Wheat. 431; *Foster v. Milliner*, 50 Barb. 293-4; *Magee v. Bierne*, 39 Penn. 63, 64; *Comparet v.*

Hanna, 34 Ind. 74, 77, 78; *Herrett v. Yandes*, Id. 102; *Donohu v. Préntiss*, 22 Wis. 311, 316, 317; *White v. Weatherbee*, 126 Mass. 450; *Butler v. Suffolk Glass Co.*, Id. 512; *Caylus v. N. Y. & Kingston R. R. Co.*, 76 N. Y. 609; *Dunham v. Bowen*, 77 N. Y. 76; *Steinback v. Relief Fire Ins. Co.*, Id. 498; *Re Brooklyn*, *Winfield*, etc.,

purchaser," say the Supreme Court; but the sale does not take anything from the former owner: it is the forfeiture which does that; and the decree of condemnation is the pronouncement of the forfeiture. It cannot possibly concern the former owner whether the land is ever sold or not, after finding that "there is nothing left in him," subsequent to the condemnation.

How, then, can the "resolution explanatory" benefit his heirs, even if it has reference to sale? What matters it to the heirs whether forfeited land be sold or kept? What matters it, after the fee has been lodged in the United States, whether they retain it for freedmen or refugees, or sell it at auction? It is the forfeiture which affects the owner and cuts off the heirs from inheriting what has been alienated by their ancestor; not the sale after forfeiture. The sale of a life estate carved out of a confiscated *fee*, would leave the *fee* vested in the libellants, and would not benefit the heirs in the least.

What Congress intended concerning sales should have been expressed or implied; and, in the absence of any expression or implication regarding sales, in the resolution, we cannot, by received rules of construction, find any legislative intent in limitation of the jurisdiction to sell as conferred unambiguously in the act itself.

§ 433. **Later Legislation.** Statutes *in pari materia* show that Congress did not intend, by the "Joint Resolution Explanatory," to limit the sale of condemned lands to their usufruct during the life of the bereft enemy, or the life estate of such enemy, for the benefit of his heirs.

By the act of 1863,¹ authorizing interventions in confisca-

R. R. Co., 19 Hun. (N. Y.) 814; Robinson v. Macks, Id. 325; *Re Roberts*, 59 How. (N. Y.) Pr. 136; *Jex v. Jacob*, 7 Abb. (N. Y.) N. Cas. 452; *Cooper v. Platt*, 45 N. Y. Supr. Ct. 242; *Schrauth v. Dry Dock Sav. B'k*, 8 Daly, (N. Y.) 106; *Gordinier's Appeal*, 89 Pa. Stat. 528; *Dunham v. Wilfong*, 69 Mo. 355; *Tutt v. Price*, 7 Mo. App. 194; *State Bank v. Rude*, 23 Kan. 143; *Turner v. Allen*, 66 Ind.

252; *Rosenmueller v. Lampe*, 89 Ill. 212; *Lyons v. Cooledge*, 89 Ill. 529; *Decatur Gas Light Co. v. Howell*, 92 Ill. 19; *Graceland Cemetery Co. v. People*, 92 Ill. 619; *Noyes v. Kern*, 94 Ill. 521; *Trescott v. Barnes*, 51 Iowa, 409; *Mally v. Mally*, 52 Id. 654; *Thompson v. Myrick*, 24 Minn. 4; *Nougué v. Clapp*, 101 U. S. 551.

¹ 12 Stat. at L. 762.

tion proceedings, persons holding mortgages *in fee* upon condemned land, may have judgment outranking the judgment of condemnation in favor of the United States; and the latter would be bound to exhaust the land, if necessary to satisfy the mortgage-judgment creditor.

By the act of 1865,¹ confiscated lands could be divided into forty-acre lots and set apart for freedmen and refugees for three years and then sold to them, at private sale, at an appraised value.

Both these statutes are of later date than the explanatory resolution, but they do not accord with it as it is now interpreted by the Supreme Court. Could land be exhausted to pay a mortgage, yet the sale be only of a life interest that the heirs of the mortgagor may get the land after it has been exhausted to pay their father's mortgage? Does the "Joint Resolution Explanatory" intend this? Could land be sold in forty-acre lots, improved with little homes and fences, and then be taken from the freedmen and refugees, that the heirs of him who had alienated it by forfeiting it might be benefited—all upon the authority of a congressional explanation anterior to subsequent statutes which refer to sales under the very act in question? If so, what becomes of the beneficent intent of the last mentioned act? And what of the justice of the former?

§ 434. **What did Congress Mean to Explain?** Congress doubtless intended to explain something, and its meaning is ready at hand; for the resolution expressly refers to "forfeiture" as a "punishment" of an "offender," and is therefore clearly referable to the criminal sections of the act, and to those only, as has been heretofore shown.² Congress meant to explain so that the President's scruples with reference to the limitation of punishment for treason, under the inhibition of the Constitution concerning personal trials and convictions, might be obviated. The President's message, when he returned the bill signed, with the resolution, makes this very clear. The debates of Congress, when the resolution was passed, remove all doubt.³

¹ 13 Stat. at L. 507.

² *Ante*, § 359

³ Chap. xxxvi., §§ 358-365.

§ 435. “Resolution Explanatory” Considered as a Proviso. Even if the explanatory resolution were not thus explainable, it still could not be construed to refer to sales of property forfeited, by any known rules of construction, to the defeat of the positive enactment of Congress authorizing sale, approved at the same time with the resolution. Had it been attached to the section on sale as a *proviso*, it could not be so construed without violence. So attached, it would be incongruous, foreign and meaningless beyond all human ingenuity employed to make it fit.

Thus, if it be granted that a professed explanation of a statute needing none is part of the statute itself; if it be granted that it is not only a part of that which it purports to explain but is entitled to the favored significance of a *proviso*; if it be granted that the *proviso* may be attached to the section on sale, we yet find no restriction of the District Court’s jurisdiction to make a judicial order for the sale of that which it has had jurisdiction to condemn, and has accordingly condemned.

Without considering the unconstitutionality of such a supposed proviso forbidding the government to sell what it owns—what it has acquired by confiscation by right of war—enough has been already suggested to show that the plain enactment of the statute, concerning sale, must stand, unqualified by a resolution on a different subject. We therefore must look to the statute itself to find what jurisdiction is conferred on the district courts to order sales for the government owner.

§ 436. The Section on Sale not Repealed by Implication. The court said in *Wallach v. Van Riswick*,¹ that the statute itself is plain and free from ambiguity, and reaffirmed this in several succeeding cases. Now it is a well-established principle of law that a statute cannot be repealed or annulled or changed in meaning, by doubtful implication.² This principle has

¹ 92 U. S. 202.

² *McCord v. Smith*, 1 Black, 459, 470; *Wood v. United States*, 16 Pet. 362; *Daviess v. Faribain*, 3 How. 646; *Naylor v. Field*, 5 Dutcher (N.

J.) 287; *State v. Berry*, 12 Iowa, 58; *Ind. School District v. Whitehead*, 2 Beasley, (N. J.) C. H. 291; *Beales v. Hall*, 4 How. 37; *Bowen v. Lease*, 5 Hill, 221; *Ludlow’s Heirs, v. John-*

grown into a familiar maxim: "That which is expressed cannot be avoided by that which is merely implied." Turn now to the statute itself to see whether it is plain as to the jurisdiction of the District Courts to sell, and as to what must be sold.

Jurisdiction to make the judicial order of sale and to establish the form of title, could not have been more fully conferred by Congress, than is done in the 8th section above quoted.¹ It is as plainly conferred as the jurisdiction to condemn. The jurisdiction over the subject matter is as unquestionable with regard to the judicial sale, and the title, as it is with reference to the decree of confiscation and the judgment of distribution.²

§ 437. **When Jurisdiction is Exhausted.** After the confirmation of such sale by the judgment of distribution of the proceeds of the sale, and the execution of the title, the jurisdiction of the District Court is exhausted. The statute does not confer any jurisdiction upon the Circuit or Supreme Courts to review the decrees and orders of the District Courts; but, since such jurisdiction has been exercised, we shall not here discuss whether there is authority to be inferred from the general judiciary acts. Certainly, however, the jurisdiction of the Circuit Courts, and of the Supreme Court, over the whole subject matter in any one of such confiscation cases, is exhausted, when the case has been taken up by writ of error, and the decrees of condemnation and sale confirmed, or otherwise finally passed upon. The jurisdiction of the Supreme Court was exhausted, (as well as that of the Circuit and District Court from which any one of these cases had been successively removed

son, 3 Ohio, 553; *Cass v. Dillon*, 2 Ohio St. 610; *Canal Co. v. R. R. Co.*, 4 Gill. & J. 1; *Williams v. Potter*, 2 Barb. 316; *Cain v. The State*, 20 Tex. 365; *Peyton v. Moseley*, 3 Mon. 80; *Neill v. Keese*, 5 Tex. 33; *Sedg. Stat. and Const. Law*, 127; 1 Black. Com., 89.

¹ Ante, § 425.

² For error or irregularity, in the exercise of jurisdiction, the decree *in rem* cannot be collaterally attacked,

if the court has jurisdiction of the subject matter. *Thompson v. Talmie*, 2 Pet. 157, 163; *Voorhies v. Bank of United States*, 10 Pet. 449; *Florentine v. Barton*, 2 Wall. 210, 216; *Harvy v. Tyler*, Id. 328, 341, 345; *Comstock v. Crawford*, 3 Wall. 396, 403, 406; *Woodruff v. Taylor*, 20 Vt. 65; *Knöfel v. Williams*, 30 Ind. 7; *Magee v. Birne*, 39 Pa. 63, 64, *State v. Central R. R.* 10 Nev. 47.

by writs of error;) exhausted¹ both with regard to the jurisdiction to confiscate to the United States and the jurisdiction to sell to the purchaser, when, in any case, a final decree had been affirmed.

It follows that no court had jurisdiction to disturb the final decrees of condemnation, confirmation of sale, and distribution, or to disturb any title by sustaining any attack upon the decree which gave it existence, unless on the ground of fraud, or some jurisdictional ground.²

§ 438. **The Collateral Cases Jurisdictionless.** The first of the ejectment suits by which a title under the proceedings we are considering was successfully attacked, was entertained by the Supreme Court, when removed thereto, on the sole ground, as we have seen, that the United States District Court had exceeded its jurisdiction by condemning more than the life estate of the enemy. The Supreme Court set aside the title of the purchaser to the land in fee simple, because, they said, the District Court had had no jurisdictional authority *to condemn* more than the life estate. On this ground, and on this alone, the appellate court based its jurisdiction over the ejectment suit which attacked the decree of confiscation and the title resting thereon.³ Had it not held that the condemnation of

¹ Ante, § 87.

² *Hobart v. Frost*, 5 Duer, 673; *Butler v. Potter*, 17 Johns. 145; *Easton v. Collander*, 11 Wend. 90; *Mygatt v. Washburn*, 15 N. Y. 316; *Baily v. Buel*, 59 Barb. 158; *People v. Supervisors*, 11 N. Y. 563; *Freemen v. Kenney*, 15 Pick. 44; *Lyman v. Fische*, 17 Id. 231; *Hannibal & St. J. R. R. Co. v. Schacklett*, 30 Mo. 550; *State v. Schacklett*, 37 Mo. 280; *Kemp's Lessee v. Kennedy*, 5 Cr. 173; *Knowles v. Muscatine*, 20 Iowa, 249; *United States v. Arredondo*, 6 Pet. 691; *Grignon's Lessee v. Astor*, 2 How. 341; *Griffin v. Mitchell*, 2 Cow. 49; *Rhode Island v. Mass.*, 12 Pet. 657; *Walker v. Wright*, 30 Iowa, 325; *Milne v. Van Buskirk*, 9 Iowa, 558;

Martin v. Barron, 37 Mo. 305; *Chase v. Christianson*, 41 Cal. 253; *Bond v. Pacheco*, 30 Cal. 530; *Elliott v. Pierisol*, 1 Pet. 328; *Alexander v. Nelson*, 42 Ala. 462; *Parker v. Kane*, 22 How. 14; *Southern Bank v. Humphreys*, 47 Ill. 227; *Davis v. Helbig*, 27 Md. 452; *Florentine v. Barton*, 2 Wall. 210; *Covington v. Ingram*, 64 N. C. 123; *Dequindre v. Williams*, 31 Ind. 444; *Shroyer v. Richmond*, 16 Ohio State, 455; *Comstock v. Crawford*, 3 Wall. 404, 406; *Mulford v. Stanzenboche*, 46 Ill. 307.

³ *Bigelow v. Forrest*, 9 Wall. 339. See remarks concerning this in *ex parte Lange*, 18 Wall. 163. See *Tyler v. Defrees*, 11 Wall. 331, where the court repelled a like collateral attack.

the property instead of life estate, was in excess of jurisdiction, it could not have entertained the writ of error from the State court of Virginia, further than to have pronounced the judgment of that court *coram non judice* and void; certainly it could not have heard and determined the collateral suit in disregard of the confiscation decree which was *res judicata quoad* all the world, nor could have disturbed the title springing from that decree.¹

That this sole ground of jurisdiction was untenable, was held in *Wallach v. Van Riswick*, and the subsequent decisions modelled upon that case. In that and those which followed it, the court based its jurisdiction on the new position that while the decrees of condemnation of the property were valid, the judicial orders for the sale of what had been confiscated were in excess of jurisdiction. This ground is seen to be untenable, by reference to the positive legislative requirement in the statute, that the court must order the sale of whatever is condemned thereunder. If so, it follows that all the decisions in the ejectment suits were rendered without jurisdiction; that the State courts where most of those suits originated, and the Federal Circuit Courts where some of them originated, were alike without authority to hear and determine the issues; and that the court of last resort had only the authority to sustain the defendants' pleas *res judicatae*, as in *Tyler v. Defrees*.²

If this view is correct, the conflict between the decisions in the confiscation cases, and those in the ejectment suits, is settled in favor of the former, since the latter cannot have the force of law. They are without authority as precedents. They

¹ We must not confound the erroneous exercise of rightful jurisdiction, with the want of jurisdiction. It is only in the latter case that judgments are absolutely void because *coram non judice*. *Dequindre v. Williams*, 31 Ind. 456; *Dynes v. Hoover*, 20 How. 65, 80; *Hobart v. Frost*, 5 Duer, 673; *Butler v. Potter*, 17 Johns. 145; *Prigg v. Adams*, 2 Salk. 674; *Henderson v. Brown*, 1 Caine, 102;

Easton v. Colender, 11 Wend. 90; *Knowles v. The City of Muscatine*, 20 Iowa, 248; *Smith v. Keene*, 26 Me. 411; *Godard v. Gray*, Law R., 6 Queen's B. 139; *Milne v. Van Buskirke*, 9 Iowa, 558; *Walker v. Sleight*, 30 Iowa, 310, 325; *Martin v. Barron*, 37 Mo. 305; *Bond v. Pacheco*, 30 Cal. 530; *Chase v. Christianson*, 41 Cal. 253; *ex parte Watkins*, 3 Pet. 207-9.

² 11 Wall. 331.

cannot be taken into consideration in any inquiry as to what is the law upon the subject of which we are treating.¹

§ 439. **Purchasers, Ejected by Collateral Attack, Must Submit.** It must be borne in mind, however, when we inquire into their operation, that they are emanations from that source which is invested by the Constitution with final power to decide upon its own authority. The inquiry is as delicate as it is important; and while it seems clear that if the highest tribunal assumes jurisdiction in cases where it really has none, its conclusions cannot be law, it is equally apparent, on the other hand, that the decisions in such cases are not wholly inoperative. Manifestly, the mandate of the court must be obeyed by the inferior magistrate to whom it is addressed, be it right or wrong. We do not go so far as to say that an inferior court must regard a void decision, by a superior, when cited as authority in another case, not involving the same subject matter; but we have no doubt of its duty to receive and obey the mandate of the latter when a case is remanded, whether there is jurisdictional authority to issue such mandate or not; and also, when a decree is affirmed or reversed, whether the order be in disregard of a previous final decree, or not; and whether or not the Superior Court is, for any other reason, destitute of jurisdiction.

It is true, also, that though a decision of the court of last resort may be demonstrably *coram non iudice* and void, it is nevertheless binding upon the litigants in the case in which it is rendered. They must submit because they have no remedy. Though they may have had a final, valid, authoritative decree rendered previously in their favor, they must submit to the later unauthoritative one against them, *ex necessitate*. For it was imperative, in the formation of the government, that there should be constituted a tribunal of last resort in which should be lodged the judicial *ultimatum*. Beyond this there is yet a means of righting wrongs, for the government as a whole must be just; but, as those means are not judicial, it is yet true that the judicial *ultimatum* is in the Supreme Court.

Submission to final judicial authority, right or wrong, is abso-

¹ Chap. ix., and authorities there cited.

lutely required of all citizens, however great the injustice they may suffer. It would be subversive of order and good discipline, were the rule otherwise.

§ 440. **The Effect of Irremediable Judgments upon Titles.** Purchasers who have attained "good and valid titles" to land confiscated from enemies, are therefore bound to give them up, if the highest tribunal so ordain, or if a lower court so ordain in obedience to a mandate from the highest. As to them, the decisions in the ejectment suits above mentioned, are as though *coram judice* and valid. Their position is that of vendees whose titles have been judicially declared void.

In some of the collateral, ejectment suits to which reference has been made, the confiscation titles were declared void *ab initio*, so that the purchasers were held to have obtained no right or interest whatever, not even for a day; while, in others, those titles were held to convey the use of the confiscated property for such time as the former enemy owner might survive. In either case, the purchaser, for good order sake, for good citizenship sake, and from necessity, is obliged to give up the property.

It would also seem that the operation of a judgment *coram non judice* upon the corporation of the United States is the same as upon citizens. As the vendor of good titles judicially decreed void, it must submit to the latest judgment of the court of last resort. It must do so for order and discipline sake, and from necessity, and because such is the rule in our civil system. It is practically bound by such judgment, right or wrong, since there is no higher tribunal to pronounce it void. It is therefore estopped from bringing such judgment into question, when the divested vendee comes back for a restitution of the price.

§ 441. **Warranty.** Ordinarily, when a vendee's title is attacked, he may call his vendor in warranty, make him thus a party to the suit, and recover the price at the time his title is decreed invalid. But, where the government is the vendor, the case is exceptional. The sovereign cannot be sued except in such way as he permits. The United States government does not permit itself to be called in warranty but prefers to be sued

directly, in the Court of Claims, upon contracts express or implied. It therefore cannot complain of not being made a party to a suit against one of its vendees. And the latter is guilty of no *laches* in not calling his sovereign vendor in warranty, so as to give him the opportunity of defending the title given.

In the titles given, under the orders of the court, by virtue of the plenary power of the eighth section of the confiscation act of 1862, there was warranty assumed by the government, as appears by the records of the cases we have mentioned. If, in some of the District Courts, titles were given without warranty expressed, it was necessarily implied; that is, there was an implied contract by which the vendor agreed to return the price in case the object of the price should fail, as there is in all such conventional transactions.¹ And this warranty, whether express or implied, was given by the vendor with full knowledge of the fact, at the time, that he could not be directly called in warranty, in case of an attack upon the title, but must be reached by the exceptional method above indicated, devised by himself; or in such other way as he might afterwards provide. He sold as owner and conveyed title as owner. Being an artificial person, he had to use the courts and marshals in making sales and titles, but he did not sell as a creditor making a judicial sale of a debtor's property to recover a judgment debt: he sold as owner as fully as any private citizen could have done in a private sale, with all the consequences of such a sale, including the obligation to return the price if he really conveyed nothing.

This being true in cases where the confiscation was afterwards held valid but the sale of the fee void, (that is, where the vendor really had become the owner of the land before the invalid sale of it by him to a purchaser,) it is yet more apparently true in cases where both the confiscation and sale were judicially declared void, after title by the government, as owner, had been given. In the latter case, the vendor sold, and took pay for, that which he had no right to sell. If, because he is a sovereign, he may retain the price, there would seem to be an

¹ Ante, chap. xiv., on Sale and Warranty.

end of just government. *Nemo debet locupletari ex alterius incommodo.*

§ 442. "Caveat Emptor" Inapplicable. In a suit by the purchaser to have the price refunded, after his having been divested of a valid title by the irresistible decree of a court without jurisdiction, neither he nor the government can deny the binding effect of such decree upon them both; but, should he be met with the maxim *caveat emptor*, he may shield himself by the decree under which he bought, and show that there was nothing of which he should have been watchful; that there was no lack of wariness when he bought; and that he should not be twitted with want of foresight with regard to the future overturning of a decree *res adjudicata quoad omnes*.

The maxim would be inapplicable, however, where the government sold as owner, not as creditor, even if the decree, upon which the purchaser's title rested, had been null and void, *ab initio*; since the government could not be allowed to retain the purchaser's money, yet give him nothing, under cover of such maxim, as we showed in the first book.¹

Several topics incidentally noticed in this chapter, are not peculiar to Things Hostile, and have been treated when considering Things in General.²

¹ Ante, chap. xiv., and authorities there cited.

² For jurisdiction of the subject matter, § 84; exercise of jurisdiction, § 85; for *coram non judice*, § 86; for *res judicata*, § 111; for collateral attacks inadmissible, § 112; for sale of

what is condemned, § 123; for confirmation of sale, § 124; for warranty by the government selling as owner, §§ 126-132; for *caveat emptor*, §§ 130, 131; and see authorities cited on those subjects.

CHAPTER XLI.

INTERESTS VESTED UNDER PUBLIC LAW CONSIDERED WITH
REFERENCE TO PARDON, REMISSION, DEATH, ETC.

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§ 443. **Procedure and Principles Alike in All Actions Against Enemy Property.** In all proceedings against enemy property, whether captured at sea or seized upon land; whether libelled under the prize act or any other act, the law of nations governs. There is no difference whatever in the application of principles, whether we consider the belligerent right to the thing based always upon enemy ownership, the civil character of the action, the notice to all the world, the default concluding all non-appearers, the finding of facts against the thing and against all persons, the decree of confiscation *res adjudicata* with regard to all, the vesting of the ownership in the successful libellant, the new title shorn of all encumbrances, the sale of it by the libellant in his capacity as owner, or the complete jurisdiction of the court of nations having charge of the subject matter, or the inviolability of its final decrees. From seizure to sale; from the forfeiting by the enemy to the conveying of title to the purchaser, there is no difference between the confiscation of naval prizes and that of enemy

property seized upon land, so far as it concerns the principles which govern.

The peculiarities appertaining to mere directory laws, such as the prize acts, non-intercourse acts, and acts to suppress insurrection, are confined to minor matters, some limiting procedure under the law of nations to designated classes of property, but none making any difference in the application of the public law in all its force to the property to be confiscated. Greater liberality has been extended to the lien holder under the other acts mentioned than under the prize acts, but that does not disturb the general application of the public law to the uniform vindication of the *jus in re*. No constitutional inhibition applies to one that does not apply to all. No limitation of the *res* applies to one that does not apply to all.

§ 444. **Error of Confounding Hostile with Guilty Things.** Whatever confusion has prevailed, with respect to the application of principles, has arisen from the confounding of proceedings against things hostile with those against things guilty; even confounding the *actio in rem* with the *actio in personam*—with criminal prosecution for treason. *Uno absurdo dato, infinita sequuntur*. When this error had been made, it was easy for all the others to follow: errors as to seizure, as to notice, as to default, as to claim, as to enemy standing in court, as to the finding of facts against the *res* and all persons, as to the condemnation of the thing operating as *res adjudicata quoad omnes*, as to the constitutional restriction to treason forfeitures, etc.

It has been shown that the divergent road from the true one was ill-advisedly taken, and the decisions which go to sustain the errors above mentioned, and others, have been clearly demonstrated to be—not law. The legislation which gave rise to those decisions may be taken out of the exceptional condition in which they placed it; and it may be confidently concluded that so far as a proceeding *in rem*—against a thing hostile—is concerned, the principles of the public law apply, whatever may be the directory statute invoking them.

In any case, so soon as it is ascertained that the *res* is enemy property, the *jus gentium* applies, and always in its full force,

unless some nation may have contented itself with the assertion of less than its full rights. The United States have not thus shorn themselves by any statute, except that it has limited itself, in seizures, as above stated: not at all in its procedure after seizure to the final result.

§ 445. **Effect of Peace Upon Belligerent Rights to Property.** By the public law, all the rights against enemy property are war rights; consequently they cease with a war. Peace does not put an end to any right vested during war; to any proceeding upon seizure already made; to any title already created. Nor does the surrender by one party operate as peace; for, till a treaty of peace shall have been made, the victorious nation may go on to indemnify itself for the expenses of war, by taking enemy property. And, where there has been legitimate war only on one side, that is, where the opposite belligerents were insurgents, there is no treaty of peace to be made; and hence, the time when the war right to take property shall cease is left entirely to the will of the nation.

The late rebellion in the United States, not having been a war among States, but one with a nation on the one side and insurgents on the other, gave rise to mutual belligerent rights only so far as the legitimate party, from necessity or other motive, may have conceded. Though the nation claimed jurisdiction over the whole country, it treated a part of its domain as enemy territory for convenience sake in the prosecution of the war; though it demanded allegiance of all its people as citizens, it treated the insurgent ones as enemies for the purpose of applying the law of nations to them and their property.

§ 446. **Citizen Enemy Property Subject to the Same Principles as Foreign Enemy Property Under the Jus Gentium.** But, once conceding from necessity or for convenience, that their property was enemy property, the principles to be applied by the courts in all proceedings against such property were precisely as though its ownership had been in a foreign enemy, in a public war, where there are two legitimate hostile parties. It follows, that a citizen enemy could no more shield himself, under plea of citizenship, from the results of confiscation, than a foreign one could.

Indeed, the proceedings against a foreigner's property, located in this country, were precisely like those against that of a citizen enemy, under any of the acts above named, when he had rendered his property liable by accepting a confederate agency to sell bonds, or otherwise assumed the enemy character; and he could just as well claim constitutional limitation to forfeiture, reservation of estate for his children, and the like.

The early chapters of this third book, on "Prize," "The Status of Property," etc., are applicable to the later ones, in their presentation and illustration of the principles of the public law. It was necessary to dwell longer upon land seizures than upon prize captures, because of the wider range and conflicting character of the decisions concerning the former; but it must now be apparent that they may all be grouped under the general head of *Things Hostile*, and may all be assigned to the province of public law.

§ 447. **Property of Enemy Citizens Libelled and Condemned Like that of an Enemy Foreigner.** As the statutes do not confine confiscations to the property of citizen enemies, the libels of information against confiscable property do not charge that the owners of the *res* proceeded against are citizens. True, there must be averment of the presidential proclamation of insurrection, but the charge against the *res* is that it is enemy property of the confiscable kind; and, as the charge fits it, whether it be owned by an insurgent or his foreign abettor, we cannot assume, in any given case, in the absence of more specific but unnecessary allegations, that any given thing, thus charged, belongs to either a foreign or rebel foe. For instance, libels against enemy property, under the statutes, brought during the late war, charged the things proceeded against to be enemy property, without designating the nationality of the owners. Could it be assumed by the courts that the owners of property so charged were necessarily citizen enemies, when proved to be simply enemies? Among the large number of cases against hostile things, (but few of which were ever taken to the Supreme Court,) could the owner of any one of those things be presumed to be of any one nationality from the pleadings, except where averred in claim or answer, and established

by proof? And, in those which found their way to the court of highest resort sitting as an international tribunal, could any owner be presumed an insurgent enemy because his property was charged simply as enemy property? Courts have not spared foreign abettors of domestic rebellion, even though clothed with consular dignity.¹ The section of country proclaimed in insurrection, during the late war in this country, was full of foreign abettors who had come as adventurers, illicit traders, blockade breakers, shields to rebels' real estate, go-betweens in the cotton trade across the military lines, agents of the so-called Confederate government, and characters of every conceivable pattern. Not the legislator in enacting the war statutes, nor the judge in expounding them, nor the executive in enforcing them, could rightly discriminate in favor of the property of such itinerant foes. The statutes did not; the pleadings against such property did not; the courts could not legally do so.

Since the actions are against enemy property, which may in any case be foreign enemies' property, the reason for preserving testimony holds good as in a naval prize case. And, while final condemnation following a judgment by default of all persons *pro confesso*, without further evidence, is good as to the *res* and the litigants, (as it would be, indeed, in a prize case,²) there should be evidence of the enemy character of the property in the form of affidavits, or other form, filed after the judgment by default against all persons, in order that any nation aggrieved may be facilitated in the investigation of the causes of confiscation.

§ 448. **Pardon, with Reference to Vested Interests.** Pardon is personal in its character, and relates to crime. It can have no reference to proceedings *in rem*. Persons indicted and convicted of crime, and sentenced to forfeit property as a penalty, may be pardoned; but the pardon of a smuggler, either before or after conviction, could have no effect upon civil proceedings against the goods that had been smuggled. So, the pardon for

¹ Coppel v. Hall, 7 Wall. 542; ² Sallouci v. Woodmas, 3 Doug. (26
Radich v. Hutchins, (5 Otto,) 95 U. Eng. C. L. R. 345.)
S. 210.

treason, either before or after conviction, could have no effect upon proceedings against his property as that of a domestic enemy. No one would contend that confiscation could be made the basis of the plea of *autrefois acquit* in a subsequent criminal proceeding.

"Pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual upon whom it is bestowed, from the punishment the law inflicts for a crime he has committed."¹

No pardon can be carried beyond the express purport of it.² "The king cannot, in the exercise of his prerogative of pardon, defeat a legal interest or benefit vested in a subject; as, for example, an interest or right of action given by statute, to the party grieved, or even a popular action after suit commenced."³

The Constitution gives the President "power to grant reprieves and pardons for offenses against the United States." Pardon includes remittance of forfeiture, when forfeiture is inflicted as penalty for crime. By statute, the Secretary of the Treasury is authorized to remit forfeitures in certain cases. But if the remittance resulting from the pardon by the President, or that granted by the secretary, be carried so far as to interfere with vested rights, it would be beyond the authority conferred by the Constitution and the laws. It has been held that even the inchoate rights of collectors, seizing officers and informants are so far vested, that pardon of the offender and remission of the forfeiture where things guilty are concerned, does not deprive such persons of their interests.⁴ And even private inchoate interest cannot be divested by the pardoning or remitting power of the President.⁵ If even the inchoate interests of captors, collectors and informants are thus inviolate, how much stronger is the case when the moiety or other share due them by the statute, has been adjudged and distributed!

§ 449. **Vested Rights of Third Persons.** And, if pardon

¹ United States v. Wilson, 7 Pet. 160.

² 5 Bac. 291; 6 Co. 13.

³ 5 Bac. 286, 287; Chitty's Cr. Law, 742, 764; 3 Inst. 240, 241.

⁴ Jones v. Shore's Executors, 1 Wheat. 470, 473; Van Ness v. Buel, 4 Wheat. 76.

⁵ United States v. Lancaster, 4 Wash. 64.

and remission, in case of penalties inflicted, cannot be carried so far as to affect rights of this character in revenue cases, how strong is the proposition that the rights of the purchasers of property condemned as guilty, are unaffected by pardon and remission! Therefore, if it were true that enemy property is confiscated for crime, the pardon of the previous owner for crime, and the remission of penalty imposed, could not possibly disturb the title of a purchaser of condemned property, sold by the government and bought by the purchaser in market overt.¹ But, since enemy property is not condemned for crime, what possible effect can the pardon of its former owner for treason, have upon the vested rights of the purchaser to property formerly owned by the pardoned person? In the case of *Osborne v. United States*, the court, after stating that the confiscation act of 1862 applied only to enemies, said that the pardon of Osborne covered "the offenses for which the forfeiture of his property was decreed."² The *non sequitur* is apparent. The court evidently lost sight of the distinction between things hostile and things guilty; they even lost sight of the distinction between criminal proceedings and proceedings *in rem*. If a purchaser's interest had intervened in this case, they even lost sight of the rule we have mentioned above applicable to the case had it been simply one for the collection of a penalty.

This case of *Osborne*, however, does not go so far as to hold that a purchaser of confiscated property can be evicted by a suit in ejectment, on the ground that the bereft enemy was pardoned after the condemnation and sale of the property. The case came up by writ of error, sued by Osborne against the libellants. Whatever may have been the practical effect upon the purchaser, in that case, the decision cannot be understood to go so far as to declare as law that the vested rights of purchasers are affected by the pardon of him who owned before confiscation. Nor is there any decision that goes so far.

§ 450. **Constitutional and Statute Authorization to Pardon.** In the absence of any such decision, we look in vain for such doctrine in the President's constitutional right to pardon, or in

¹ *E. S. Brown v. United States*, McCahon's Rep. (Kan.) 229: Miller, J. ² 1 Otto, 474; ante, 393.

the act of 1862 bestowing the right by statute. The thirteenth section authorizes him to grant pardon and amnesty to persons participating in the rebellion, but contains nothing whatever with regard to property. President Lincoln cited this section in his pardon proclamation, and then added "with restoration to rights of property, except as to slaves."

The reference to restoration of rights of property may be satisfactorily explained (without doing violence to any principle of law or of interpretation) as meaning the remittance of the forfeitures mentioned in the first and second sections of the act of 1862.

The first section imposes a fine of not less than \$10,000 and the freedom of the slaves of the person found guilty of treason; and it further provides that his fine shall be collected "on any or all of the property, real and personal, excluding slaves, of which the said person so convicted was the owner at the time of committing said crime, any sale or conveyance to the contrary notwithstanding." Section 2 has similar provisions. Section 3 provides, "that every person guilty of either of the offenses described in this act shall be forever incapable and disqualified to hold any office under the United States." These provisions show very clearly what the President meant by the restoration of rights—rights to the forfeited privileges of citizenship—rights to property not yet sold in collection of the fines imposed—and it renders perfectly intelligible the expression "except as to slaves," which clearly refers to the sections we have quoted, where liberation of slaves is made part of the penalty for treason.

The President's reference to the "restoration of rights of property except as to slaves" cannot be explained upon any other theory without doing violence to principles of law; therefore, we must give the President's language that interpretation which is consonant with law.

We must apply the same just rule of interpretation to the subsequent proclamations of pardon and amnesty, issued by the succeeding President. None of them can be properly construed to aim at the disturbance of vested rights in violation of well established principles of law. Indeed, were a pro-

clamation to go beyond the law, it would be a mere *brutum fulmen*.

§ 451. **Amnesty.** Amnesty is an act of oblivion for past offenses; it is granted to offenders—not to enemies as such; it effaces a crime or misdemeanor; it is usually proclaimed in favor of a class of criminals or wrongdoers, rather than to an individual, for the purpose of promoting public order. When it is tendered to insurrectionists, it is not to them as belligerents but as offending subjects: for the act is one of clemency from the sovereign, and necessarily presupposes the right of the sovereign to recognition and obedience when it proposes to both forgive and forget the violations of duty on the part of those who ought to have obeyed. Amnesty is ordinarily granted without the previous existence of any prosecution against the offenders: pardon is usually after conviction, though not necessarily so. Amnesty cannot affect a civil action pending against enemy property any more than pardon can.

Amnesty creates no oblivion of facts, except the fact of the crime or offense. If a mob be pardoned and amnestied for an outbreak, the fact that one's store has been pillaged remains, and civil action for damage could not be defeated by the plea that government had granted amnesty.¹

§ 452. **Remission of Forfeiture.** There is a statute under which the Secretary of the Treasury is authorized to mitigate or remit fines, forfeitures or penalties, and to remove disabilities, incurred by authority of any provisions of law for the suppression of insurrection.² Application must be made to the district judge, who, after hearing the petitioner and any opponent, must refer the matter to the Secretary for decision.

¹ For further on the subject of pardon and amnesty, see the cases of *Cummings v. Missouri*, 4 Wall. 277, and *ex parte Garland*, Id. 333, and the learned briefs there epitomised on the effect of pardon and amnesty, *pro* and *con*, with the numerous cases and incidents cited. The court, sustaining the pardon for the offense of *Garland*, said, (p. 381.) "There is this limitation to its operation: it does

not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment. 4 Black. Com. 402; 6 Bacon's Abridg., tit. 'Pardon;' Hawkins, book 2, c. 37, §§ 34, 54." Field, J.

² Rev. Stat., § 5292, where it is found imbedded with various other authorizations to remit fines and forfeitures imposed by other statutes.

Of the two acts professedly, by title, for the suppression of insurrection, but one provides for fines and disabilities; and that one is the "Act to Suppress Insurrection," etc., approved July 17, 1862—the first four sections of which provided relative to those subjects, and not the remaining sections. Disability to hold office under the United States, and a fine not limited by the statute, are among the penalties for treason, which may result in practical forfeiture of all the convict's estate.

It is certain that this statute has no reference to the remission of the confiscation of enemy property. It can have no reference to remission of forfeiture worked by fine, where property has been sold and the title vested, unless it means that, in such case, the loss is to be made up to the convict, out of the public treasury. Neither the power of pardon by the President, nor remission by the Secretary, can possibly affect the new title from confiscation, after it has been vested in the United States or a purchaser from the government. The provision seems to be more plausibly referable to the treasury regulations under the non-intercourse acts.

§ 453. **Death of the Former Owner After Title Vested in Another.** There is a striking similarity between the pardon and the death of one who has alienated his property by forfeiting it, with reference to the new title vested in the United States or in another person. It has been seen that pardon subsequent to the vesting cannot affect the title: can death? The divested person's heir is but a continuance of himself; and if by his death the title comes back to his heir, it virtually comes back to himself. Title is wholly vested in the United States by confiscation, as the Supreme Court has repeatedly and definitely decided; and therefore there can be no way of divesting it but by grant. This cannot be, because there is no statute authorizing it expressly or impliedly, except those that authorize sale; and grant by donation cannot be directed by statute for want of constitutional warrant. Neither the pardon nor the death of the prior owner can affect the title derived from any source; certainly it cannot, when derived from a proceeding *in rem* which is as conclusive against heirs at law as it is against

every other person, since the decree, after general notice, is *res adjudicata quoad omnes*.

To give condemned property to the heir is to give it back to the former owner; for *hæres est alter ipse, et filius est pars patris*: "an heir is another self, and a son is a part of the father." As Lord Coke said, *Hæres est eadem persona cum antecessore*:¹ "The heir is the same person with the ancestor." And again: *Hæres est pars antecessoris*:² "The heir is a part of the ancestor." And, by the civil law, *hæredibus nihil aliud est, quam successio in universum jus, quod defunctus habuerit*:³ "The right of inheritance is nothing else than the faculty of succeeding to all the rights of the deceased."

§ 454. **Suggestions.** More space has been devoted to the explanatory resolution than would have been required had it not been sometimes applied to enemy property, though equivalent to the clause of the Constitution which limits forfeiting for treason; for it thus tended to affect the whole subject of Things Hostile.⁴

Such misapplication tended to destroy the distinction between hostile and guilty things, and even between personal suits and proceedings *in rem*: hence the necessity of showing that it cannot rightfully claim the support of authoritative decisions.

The perspicuous treatment of Proceedings in Rem, as a system, required that Things Hostile should be accurately distinguished from the other two classes of things; and therefore the relation of this book to the others, with its bearing upon them, would be a sufficient apology for its existence, were it not entitled to its place as a component part of the general subject, and also for the practical importance of its topic.

¹ Coke Litt., 22.

² Id.

³ Dig. 50, 17, 62.

⁴ The prize, non-intercourse and insurrection laws are all *in pari materia*, with reference to the confiscation of enemy property, and none of them distinguish between foreign and domestic enemies; so the doctrine of Jones v. Buckell, (ante, §

338,) may easily be extended to all. And if the resolution, as has been held, is but the repetition of a clause of the Constitution, the conclusion would be that there is a constitutional inhibition of the confiscation of any enemy property except under the limitation fixed to forfeitures in treason trials.

The temptation to enlarge upon the interesting and ever growing subject of International Law has been withstood, so that only so far as concerned enemy property and proceedings against it has that branch of jurisprudence been discussed.

The subject of enforcing liens against enemy property, under the statute,¹ properly belongs to the next book, in which it will be treated.²

¹ United States Rev. Stat., § 5322.

² Post, chap. liii.

BOOK IV.

ACTIONS AGAINST THINGS INDEBTED.

PART I.

PROCEEDINGS WITH GENERAL NOTICE.

CHAPTER XLII.

JUS AD REM FROM CONTRACTS, ETC.

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§ 455. **Debtor-Property and the Right Enforceable Against it.** The *jus ad rem*, or relative right to a thing to the extent of the lien-bearing debt upon it; or, more briefly, the right in a thing to the amount of the debt,¹ is almost always the one which the action against indebted things is employed to enforce. The major right, synonymous with title or ownership,² is usually accompanied by possession, so far as this class

¹ Ante, § 27.

² Bouvier's Law Dict., *Verbo*, "*Jus in re*;" Ante, § 27.

of things is concerned; and proceedings against such property to declare it forfeited, under a contract, because of the failure of the debtor to redeem it, are not usually required by statute. Pledges, pawns and common law mortgages are familiar illustrations of the contingent major right becoming perfected without judicial action, by operation of law upon a contract, followed by failure of redemption. This greater right usually exists without possession of the thing on which it rests, so far as concerns the other two classes of things; it exists as a perfect right, title or proprietorship, before seizure.

An indebted thing is that which is, by fiction of law, primarily responsible for a civil obligation to pay a debt. The responsibility arises by operation of law upon a contract expressed or implied, or upon a wrong inflicted on person or property. Contracts which create liens; injuries which give rise to obligations and liens for the reparation of the wrongs; and agreements of parties in which there are no stipulations concerning liens but in which such stipulations are supplied by law, (as in maritime contracts,) are the sources of property responsibility for debt.

The object of the action against debtor-property is to make the money that is owing by it. When that object is accomplished, any surplus of proceeds inures to the owner of the *res* proceeded against. He may stop the proceedings at any stage by paying the debt, while the owner of a thing guilty or hostile has not this privilege. Criminal law terms, applicable to a limited degree, in prosecutions of offending things, are wholly irrelevant when applied to the class now under discussion; and technical words and phrases, peculiar to the law of nations and applicable to things hostile, are not pertinent when indebted property is the defendant, except, to some extent, when maritime liens are sought to be enforced. While actions against things deemed guilty are cognizable in municipal courts as well as in admiralty, those against things deemed hostile are confined to courts of nations, while those against things deemed in debt are conducted in either, according to the character of the cause. While sale to execute judgment is not necessary in the first two classes of actions *in rem*, it is absolutely so when the pay-

ment of debt is the object of the suit. The three classes might be further distinguished, but all that is peculiar to the class to which this fourth book is devoted, will sufficiently appear as we proceed.

§ 456. **Forfeited Pledges and Pawns; Mortgages.** When property is pledged or pawned, and the pledgor fails to redeem it in time, no action is necessary, as it is in the possession of the pledgee, at the date of the forfeiting, and immediately becomes his property by the terms of the contract of pledge or pawn. The case is one, however, in which the *actio in rem* would be the proper one to fix the *status* of the thing as against the world, should the legislator require such procedure. In the present state of the law, it seems that a purchaser at a pawnbroker's sale of forfeited pawns gets only such right of property as the pawnor previously had. The pawnbroker, it has been held, does not guaranty the thing which he sells, and for which he gets the price.¹ In a contract containing the condition that certain property, real or personal, shall be forfeited upon the failure of the contracting party to do required service, and where the forfeitable thing remains in the hands of that party, it would be consonant with the system we are discussing, should the opposite party be authorized to assert his *jus in re* by direct action against it.

If a government can constitutionally forfeit land or other property for failure to pay taxes, it might properly have the forfeiture judicially declared by proceedings *in rem*. It does not appear how property can be constitutionally forfeited on this ground, however, for the right is only to the amount of the tax debt, and is a mere *jus ad rem*.² Whatever the property may sell for, after satisfying the tax, government has no right to—unless non-tax-paying be deemed an *offense*.

The common-law mortgage is accompanied by possession, and ordinarily no suit is required upon failure of the personal debtor to redeem the obligated property; but the civil-law mortgage is a lien, without possession of the property by the creditor. The latter kind of mortgage is in use by several of the states.

¹ Benjamin on Sales, 467-470.

² Ante, Chap. xxvii.

It will be seen, that while *pledge* and *pawn* are properly included in the more general term, *privilege*, they can have but little place in a work on suits *in rem*, while the various classes of liens will occupy most of the book. And, of these various classes, we shall have to do, not with all which are susceptible of enforcement by the remedy, but especially with those which are thus enforceable by the law as it stands.

§ 457. **Privileged Debts.** There are many privileged debts, so called because they outrank ordinary debts in a *concursum*, but which are not enforceable directly against a thing, unless there is a statute authorizing such procedure. Against the property of a succession, debts rank, one after another, such as funeral charges, law charges, servant's wages, family supplies, etc. Liens of artists, mechanics, common carriers, and hotel keepers, afford proper ground for legislative authorization for the action against that upon which the lien rests, but the legislation has not been uniform among the States.

Privileged debts may be defined as those to which the law gives a preference over ordinary debts. Privilege is defined, in the civil law, as a right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors.

It cannot be said that property is, by fiction of law, an indebted thing, when the privilege goes no further than to give the creditor a preference over other creditors, in executions against it.

It is true that the creditor has a right to the amount of his privileged debt; and that such *jus ad rem* would justify the law maker should he authorize the direct remedy against the property; but, in the enforcement of the civil law *privilegium*, and in the vindication of liens generally, the direct action against that upon which the lien, privilege or mortgage rests, is not usually employed or authorized.

§ 458. **Common Law and Equitable Liens.** A common law lien, (such as that of hotel keepers upon the baggage of their guests; warehousemen on goods for storage; tailors on clothes made by them; vendors for the price of goods sold but not delivered,) cannot give rise to the direct action *in rem*, for

the evident reason that the thing that may be said, by fiction of law, to be subsidiarily, rather than primarily indebted, is already in the creditor's hands, and does not need seizing; nor does it need any condemnation unless a statute should require it, with an order of court for its sale, if not redeemed by the debtor. Such is precisely the case with a thing pledged or pawned. Possession is necessary; and, should the debtor fail to pay and thus redeem the pledge, no seizure and judicial condemnation are required. After personal judgment, with privilege upon the thing, there may be a judicial order of sale, similar to that in ordinary cases of execution.

There are some equitable liens which may be enforced *in personam*, though the creditor have not possession, which are analogous to the civil law liens. These are strictly liens and not pledges under a false name: for instance, where one has paid the price for a thing prematurely, he has a lien on that thing for the sum paid; where a tenant for life makes permanent improvements in good faith, he has a lien on the improved property, to such amount expended as will repair his loss; and various other examples might be given.

§ 459. **General Notice.** Liens directly enforceable by the action *in rem*, either by law or by admiralty, are enforced against the thing indebted, without any personal citation of the owner. The notice is to all persons: not specifically to any particular proprietor or debtor. The judgment holds good against all the world, as in cases against the other two classes of things we have considered; but the judgment is for a specific amount—not for the forfeiture of the thing itself.

It is proposed, in elucidation of the subject, to treat first of the vindication of maritime liens in general; of the authority of the judiciary over admiralty remedies; of the several kinds of admiralty liens; of other liens enforceable *in rem* by authorization of Congress; of interventions upon claims against things proceeded against; of the law to allow the enforcement of liens in confiscation cases; and of state liens and their enforcement, when there is general notice by publication. Proceedings with limited notice will afterwards be considered.

§ 460. **Maritime Liens.** Admiralty liens are always en-

forceable by the action *in rem*, with general notice by publication. They bear upon ships, freights and cargoes, holding them primarily responsible for debt, without any reference whatever to the owner of such property. True, the owner may be personally liable for the same debt, and the creditor may elect to sue him alone; but if the suit be brought against the indebted property alone, it does not matter who is the owner, or whether there is any at all. There may be a mixed action—a suit against a ship, the master and the owners—with a seizure of the ship and a notice by advertisement to the world, and with a personal citation to the owners; but such mixed action is anomalous and ought not to be encouraged.¹

The lien is the *jus ad rem* to the extent of the debt. It does not depend at all upon possession, as the common law lien does.² It is unfortunate that the two rights bear the same name; for many errors have been the result of confounding the latter with the former, when it much more resembles the civil law pledge or pawn than the lien.

The invariable distinction between the lien and the pawn, in the civil law, is that the former may exist without the possession of the thing upon which it rests, while the latter cannot exist except with possession.

As a general rule, maritime liens are considered not assignable.³

The jurisdiction for the enforcement of maritime liens by action *in rem* is in the Federal courts exclusively;⁴ and the

¹ Newell v. Norton, 3 Wall. 257; The Sabine, 101 U. S. 384; Bondies v. Sherwood, 22 How. 214.

² The lien is not varied by the taking of a note for the debt, unless expressly so agreed; The Napoleon, 7 Bissel, 393.

³ The Barque George Nicholas, 1 Newberry, 450; The Eolean, 1 Bond, 267; The Freestone, 2 Bond, 234; Reppert v. Robinson, Taney's Dec. 492; Schooner Kensington, 8 Am. Law Reg. 144; The Tug Champion, 7 Chicago Legal News, 1; The Patchin, 12 Law Rep. 21.

⁴ Judiciary Act of 1789, § 9; The Belfast, 7 Wall. 624; The Betsey, 4 Cr. 442; La Vengeance, 3 Dal. 297; The Octavia, 1 Wh. 24; The Samuel, Id. 9; New Jersey Nav. Co. v. Merchants' Bank, 6 How. 344; Walters v. St. Bt. Mollie Dozier, 24 Iowa, 192. But, see Trevor v. The Steamboat Ad. Hine, 17 Iowa, 349; and Vose v. Cockcroft, 44 N. Y. 415; Sturgis v. Boyer, 24 How. 110; Chamberlain v. Ward, 21 How. 548; Roach, v. Chapman, 22 How. 129; The Jerusalem, 2 Gal. 191; Frances v. The Barque Harrison, 1 Saw. 355.

original jurisdiction is confined to the District Courts.¹ It was held however, in a case of marine tort, that there was remedy at law, under a statute of Rhode Island, by personal action; the decision resting upon the exception which saves to suitors such remedy as the common law can give.²

§ 461. **General Meaning of "Admiralty" and "Maritime."** The Constitution³ gives to the judicial power, "all cases of admiralty and maritime jurisdiction." The framers did not define the terms they used; but they should be understood as using those terms in the sense in which the words were well known to the whole commercial world, at the time the Constitution was adopted. The States on the continent of Europe in which the principles of the civil law, in some form prevail, (and there is no exception;) and all the States of our own continent on either side of the isthmus of Panama, where, (with but two exceptions,) the same system prevails, understand the words "admiralty and maritime" as used in the civil law sense. Did the framers of the Constitution mean to confine those terms to the English sense?

They did not say so. They should have said so, had they meant thus to restrict the meaning. There is nothing ambiguous in the sentence in which these terms are used. In the absence of ambiguity, are we to seek the intention of the framers?

If we note the conjunction of the two terms, we may infer that the authors of the sentence may have anticipated some attempt thus to confine their meaning. Is there not significance in the use of the word "maritime" in addition to that of "admiralty?" Had the latter stood alone, the reader might have thought that admiralty jurisdiction was to be such as had long been exercised by the English High Court of Admiralty, and there would have been more plausibility in such a conjecture than

¹ *The Moses Taylor*, 4 Wall. 411; *The People's Ferry Co. v. Beers*, 20 How. 393; *Weston v. Morse*, 40 Wis. 455; the cases just previously cited, and those cited in Book I., Chap. on Jurisdiction.

² *Steamboat Co. v. Chase*, 16 Wall. 522. Also, *Baird v. Daly*, 57 N. Y. 236; *Swartwout v. N. J. Nav. Co.*, 48 N. Y. 209; *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1.

³ Art. iii., § 2.

there can possibly be now, with the ancient and civil law term "maritime" conjoined. The word was added *ex industria* that there might be no mistake.

At the time of the composition of the Constitution, England herself, under the influence of Lord MANSFIELD and others, was slowly emerging from the contest which Lord COKE had urged against the admiralty and against all advances of the civil law in any form; for Lord MANSFIELD was an admirer of the Roman civil code, and was ever ready to welcome the salutary influences of the general jurisprudence of the world, to mollify that of his own country. His learned successors in the chief justiceship of England have had little of Lord COKE's animosity to the law of the seas. It seems likely that our Constitution-making fathers meant to adopt the maritime system of the world in its symmetry and its progressive tendency.

§ 462. **The Terms as Used in the Constitution.** That the Constitution incorporates the maritime law rather than the English variation of it, seems clear from Art. iii., sec. 2, par. 1, of that instrument:

"The judicial power shall extend—

"1. To all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;

"2. To all cases affecting ambassadors, other public ministers and consuls;

"3. To all cases of admiralty and maritime jurisdiction;

"4. To controversies between two or more States," etc.

Evidently, "cases of admiralty and maritime jurisdiction," were not included in the clause, "To all cases in law and equity arising under this Constitution, the laws of the United States, and treaties." Had the framers of the Constitution entertained the English idea that maritime law could have existence only so far as made part of the law of England, the third clause, above quoted, would have been supererogatory. They, always laconic, would have omitted the third clause altogether, had they held Lord COKE's opinions. They, always perspicuous, would have qualified their terms and said "admiralty and maritime jurisdiction as limited in England." By using the general

terms, they must be understood to have meant the system recognized by the nations generally.

§ 463. **The Terms as Defined by Commentators.** The earliest opinions we have upon the subject, support this view. The *Federalist* says, (commenting upon the clause marked "3" above,) "The most bigoted idolizers of State authority have not, thus far, shown a disposition to deny the national judiciary the cognizance of maritime causes. *These so generally depend upon the law of nations*, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace."¹

Chief Justice JAY gives, as the reason of the extension of the judicial power to all cases of admiralty and maritime jurisdiction, the following: "Because, as the seas are the joint property of nations, *whose rights and privileges relative thereto are regulated by the law of nations* and treaties, such cases necessarily belong to national jurisdiction."²

Chancellor KENT says: "The maritime law of the United States is the same as the marine law of Europe. It is not the law of a particular country, but *the general law of nations*."³

Judge STORY says: "This grant in the Constitution, extending the judicial power 'to all cases of admiralty and maritime jurisdiction,' is not to be limited to, nor interpreted by, what were cases of admiralty jurisdiction in England, when the Constitution of the United States was adopted, but extends the power, so as to cover every expansion of such jurisdiction. The admiralty and maritime jurisdiction, (and the word 'maritime' was, doubtless, added to guard against any narrow interpretation of the preceding word 'admiralty,') conferred by the Constitution, embraces two great classes," etc.

§ 464. **Maritime Jurisdiction in Civil Law Countries.** There is no difference whatever between the lien of the Roman civil law, and that of the maritime law, nor is there any in the method of enforcing it. From the earliest periods of which we have any account, the fiction of the primary indebtedness of things

¹ The *Federalist*, No. 80.

Dall. 419.

² *Chisholm v. State of Georgia*, 2

³ III. Kent Com., Lecture, xlii.

has been found convenient, and has been acted upon in practice. At what precise time the action *in rem* was first resorted to, cannot now be ascertained; but it may well be assumed that the necessity for it suggested its use as soon as maritime commerce had made any considerable progress. It is highly probable that the Phœnicians made use of this form of action. Rome, in the time of Augustus Cæsar, had adopted the Rhodian code; but it would be idle, to inquire whether the maritime lien and the process *in rem* were derived by the maritime system from the civil law, or, on the contrary, derived by the civil law from the maritime system. The better view—doubtless the only true view—is that both systems are the result of the long and slow growth of legal science in general. The growth has been towards the better understanding of principles and the simple application of remedies. There is a general likeness to the Roman system, in all the legal systems of continental Europe. Though each nation has its own civil law, *i. e.*, its own municipal law, yet all may be said to have the civil law system in various modifications.

Certainly all the modern nations that have drawn their jurisprudence from Rome—notably France, Spain, Italy, Germany, Austria and Portugal; and states which have inherited it from the countries last named—notably Mexico, Louisiana, and the Central and South American republics, and Brazil; as well as ancient nations among whom the principles and remedies of law grew up simultaneously with the growth in Rome; and also the modern countries which have received and enlarged upon the same general system, maintain uniformity in their legislation so as to harmonize it with the general system. Judging by expressions from the British admiralty, the tendency is now towards a more liberal recognition, in England, of the general maritime law.¹

¹ The *Patria*, 3 Law Rep. 461-2: 63, (1876;) *Gunnestad v. Price*, and Sir R. Phillimore, J. The *Queen v. Fullmore v. Wait*, 10 Court of Ex. 65. *Keyn*, II Excheq. Div. Law Rep., p.

CHAPTER XLIII.

REPAIRS AND SUPPLIES TO VESSELS, STEAMBOATS, ETC

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§ 465. **No Distinction Between Home and Foreign Ports by the General Maritime Law.** Whether the ship's captain can bind the ship, for repairs and materials in a home port, so as to render her amenable to the action *in rem*, has given rise to much discussion. The twelfth Rule of Admiralty practice has been varied by the Supreme Court, as either side of the question has had temporarily the preponderance. The rule, as it now stands, allows the action *in rem*.

Maritime law makes no distinction between home and foreign ports, with reference to the claims of repairers of ships, furnishers of material, furnishers of supplies, and other persons rendering necessary service to the ship. Nor does that system of law distinguish between domestic and foreign ships, with regard to repairs, materials and supplies furnished. Under that system, he who repairs a ship, or furnishes supplies or repairing materials to a ship, obtains a lien upon her, without any express contract to that effect, and may enforce his lien *in rem*.

Conkling expresses the general rule as follows: "The maritime law of continental Europe makes no distinction between the cases of domestic ships and foreign ships, nor between supplies furnished in a home port and abroad." He then gives the

English exception as follows: "The result of the modern decisions of the English courts appears however to be that, with the exception of the common law lien in favor of a shipwright while he continues in possession of a ship which he has built or repaired, no lien or preference is given by the common or maritime law of England, for repairs made or supplies furnished in a home port, without an express hypothecation."¹

And Parsons says: "By the general maritime law, and the civil law from which many of its provisions are derived, all material men have a lien on the ship." Then, after showing that this lien was enforced by the English Admiralty till the reign of Charles II., but has since been denied, he adds: "This lien or *privilegium* by the civil law and the general maritime law, extends to all ships without any distinction between foreign and domestic vessels. Here, however, it is otherwise," etc. He finds it "otherwise" here only because the twelfth Admiralty rule, as existing when he wrote, made it otherwise.²

Mr. Benedict says, speaking of this right of material men, "The civil law, the general maritime law, and the particular maritime codes, extend this lien and privilege to all ships and vessels, without any distinction between foreign and domestic vessels."³

And Chief Justice MARSHALL says: "In admiralty cases, the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise."

Mr. Addison states generally that wherever a maritime lien exists, it gives the *jus ad rem* to be carried into effect by proceeding *in rem*.⁴

§ 466. **Rule and Usage of the Civil Law.** Abbott, under the head of "Charges upon the ship *in specie*," writes: "Every man who had repaired or fitted out a ship, or lent money to be employed in those services, had by the law of Rome, and still possesses in those nations which have adopted the civil law as the basis of their jurisprudence, a privilege, or right of pay-

¹ Conkling's Admiralty, I., 77, with reference to Abbott on Shipping, 490-1-2, and cases there cited.

³ Benedict's Admiralty, § 272.

Part ii., Ch. 3, § 9.

⁴ Addison on Contracts, 273, (Sixth

² Parsons on Maritime Law, I., ed.)

ment in preference to other creditors, upon the value of the ship itself, without any instrument of hypothecation, or any express contract or agreement subjecting the ship to such claim."¹

This remark of the commentator upon the law of shipping, however, needs to be received with some emendation. The lien is not on the value of the ship, but on the ship; the right and the remedy are not confined to those nations which have adopted the civil law, but belong alike to all civilized nations, as a part of the law of nations. His intimation that the right and the remedy have come from Rome, may be strictly accurate. The Roman law, surely, as well as that of all civil law countries, is in harmony with the general maritime law of nations, with regard to this right and remedy.

*Qui in navem extruendam, credidit, vel etiam emendam, privilegium habet.*²

*Quod quis navis fabricandæ vel emendæ, vel armandæ, vel instruendæ, causâ, vel quoquo modo, crediderit, vel ob navem venditam petat, habet privilegium post fiscum.*³

And the lien or privilege of the civil law extends to all who lend money for the preservation or the repair of a thing.⁴ And the *privilegium* of the civil law, is recognized in France;⁵ and, not to be tedious, we conclude by saying in all civil law countries. It includes the lien upon ships which we are discussing.⁶ The Revised Civil Code of Louisiana, (following the old code,) recognizes among privileged creditors of ships and other vessels, those who have furnished materials * * * supplies, labor, repairing, victuals, armament and equipment.⁷ And this is the general doctrine.⁸

¹ Abbott on Shipping, Part ii., p. 142, Chap. iii., (7th Am. ed.)

² Digest, 42, 5, 26.

³ Digest, 1, 34; *Vide*, Id. 20, 4, 5, 6; Novell, 97, c. 3.

⁴ Domat's Civil Law, (Strahan,) Vol. i., Part i., Book iii., § 5, No. 1741.

⁵ French Ordinances, liv. i., tit. xiv.; *Code de Commerce*, art. 197; French Code, liv. i., tit. xii.; art. 3.

⁶ Williams & Bruce's Practice, 154; 3 Kent's Com. 168, 169; The John, 3 Rob. Ad. 288; *Hosmer v. Bell*, 7 Moore's Privy Council, 24; The Nestor, 1 Sum. 79.

⁷ Rev. Civil Code of La., Art. 3237.

⁸ 2 Brown's Civil and Admiralty Law, 142; Maude & Pollock on Shipping, 67; 1 Valin, 363, 369; *Ordonnance de la Mer*, tit. ii., art. 1;

§ 467. Decisions Recognizing the General Maritime Law.

And our courts have, from time to time, recognized the doctrine that the lien of material men is a maritime lien, deriving its authority solely from the law of nations, and that the corresponding remedy is from the same high source,¹ though the doctrine has been, by the decisions, greatly unsettled.

And, indeed, while the English courts seem to recognize a sort of peculiar English maritime law in contradistinction to that of nations, they have repeatedly said that the general maritime law gives the lien for repairs, supplies, etc., furnished by material men to domestic ships.²

On the right of material men in a home port, directly to assert their claims against the ship they have repaired, as lien holders, with or without previous hypothecation of the ship expressed, the maritime law of the world stands opposed by England, generally speaking, notwithstanding the English decisions just cited.

The Court of King's Bench have expressed England's exceptional condition emphatically, saying that although by the maritime law every contract with the master of a ship implies a hypothecation, yet it is otherwise by the law of England, unless expressly so agreed.³ The cases are numerous in which the lien is denied, and the *actio in rem* therefore refused as a remedy; but, since England does not recognize the maritime law of nations, and claims to have an admiralty system of her own, exceptional to that acknowledged for ages by the rest of the civilized world, it seems clear that the "admiralty and

Cleirac Jur. de la Mer, 351, art. 6; Cesaregis Dis. 18; Roceus de Nav. et Nat. 82, 91, 92, 93.

¹ The Brig Eagle, Bee, 78; The Ship Levi, Dearborne, 4 Hall, Law Journal, 97; The Jerusalem, 2 Gallis, 345; The Brig President, 4 Wash. C. C. 453; The Aurora, 1 Wheat. 96, 105; The St. Jago de Cuba, 9 Wh. 409; and even the case of the General Smith, (upon the general doctrine,) 4 Wh. 438; while the following, among others, recognize the

lien with the corresponding remedy, against domestic ships: The Sandwich, 1 Pet. Ad. 233, note; The Ship Jersey, Id. 223.

² The Neptune, 3 Haggard, 142; Hoar v. Clemont, 2 Shower, 338; Wilkins v. Carmichael, 1 Doug. 105; Watkins v. Bernardiston, 2 Pierre Williams, 267; Ex parte Shank, 1 Atkyns, 234.

³ Justin v. Ballam, (Mich. Ter. 1 Anne,) Salk. 34; 2 Ld. Raym. 805.

maritime jurisdiction" adopted in the United States by the Constitution, is that recognized by the law of nations, and not the crippled system of England; and is that which furnishes the general rule of action for the civilized world, and not the exception to the rule.

Now, recurring to the principle briefly expressed above from Conkling, that "the maritime law of continental Europe makes no distinction between the cases of foreign and domestic ships, nor between supplies furnished in a home port and abroad," it may be asked, does the right to enforce the lien of material men, by the action *in rem*, depend upon the existence of the twelfth rule of Admiralty adopted by the Supreme Court?

It seems that it should not. The vindication of such a *jus ad rem* by the *actio in rem* exists under the system of maritime law, the jurisdiction over cases under which is given to the judiciary. It is as clear that material men may thus proceed as that captors may proceed *in rem*, on the prize side of the admiralty. Every argument in favor of the action in the one case applies to the other. The distinction which Judge STORY has learnedly drawn between prize and other admiralty cases, when discussing the question of exclusive Federal jurisdiction, (he differs from Kent and Rawle,) does not seem well founded; and, so far as the remedy *in rem* is concerned, he finds no distinction.¹

§ 468. **Whether the Supreme Court may Deny the Remedy In Rem by Rules.** Have the Supreme Court any right to abrogate the remedy of material men, in a home port, to enforce their lien, by proceeding *in rem*?

We have seen that the remedy is authorized by the general maritime law, and that the United States have adopted the general maritime law.² But the Supreme Court, under its authority to make admiralty rules, have successively permitted and denied to material men, in home ports, this right to proceed *in rem*.

Congress has authorized that court to make rules of practice

¹ Story Const. ii., §§ 1666-1672, (3d Ed.)

² Ante, Chap. xlii.

in causes of admiralty and maritime jurisdiction.¹ Acting under this authority, the court denied the action *in rem* to repairers of domestic ships in a home port, holding that there was no lien unless created by State law.² This was in 1819. In 1833, a lien established by State law was enforced *in rem* in admiralty.³ In 1844, the court adopted the twelfth rule, authorizing proceeding *in rem* against domestic ships, "where, by the local law a lien is given to material men for supplies, repairs and other necessities;" but in 1859, they changed the twelfth rule, and wholly denied the remedy by proceeding *in rem* "in cases of domestic ships for supplies, repairs or other necessities."

The remedy was restored by the court in 1872, when they adopted the following as the twelfth rule: "In all suits by material men for supplies or repairs or other necessities, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*." This includes, of course, suits in home ports against domestic vessels; and this is the rule at present.

But, if the Supreme Court, under the legislative authorization simply to make rules of practice, has power to authorize or withhold the *actio in rem* at pleasure, we cannot know how long this maritime remedy may continue to be allowed. The court's jurisdiction over admiralty and maritime causes is conferred by the Constitution; but that jurisdiction is judicial merely. The distribution of the powers gives all legislative power to Congress and all judicial to the Supreme Court and such inferior courts as Congress may from time to time establish. Congress itself cannot abrogate the law of nations appertaining either to war or commerce—much less delegate authority to the judiciary so to do. Congress, in giving the Supreme Court authority to make rules of practice to govern admiralty and maritime causes, has not, in terms, empowered the court to abolish a time-honored remedy of the law of nations.

Yet the court has exercised control over the rights of action

¹ 1 United States Stat. at L. 275, Act of May 8, 1792; 5 Id. 516, Act of Aug. 23, 1842.

² The General Smith, 4 Wheat. 443.

³ Peyroux v. Howard, 7 Pet. 324.

so far as to create or abolish it, as we have seen. And C. J. TANEY, in a case as late as the 1st of Black,¹ gives as a reason for the distinction between the two classes of vessels, that supplies furnished to a foreign ship are presumed to be furnished on her credit, while those furnished to a domestic one are presumed to be on the credit of the owner. He held that the local or municipal law was the governing principle, while admitting that the contract he was considering was a maritime contract, and that the lien with its corresponding remedy would apply in such a case in countries where the civil law prevails. If each country is to be understood as making its own admiralty laws, no such thing as a general system is possible. Just as plausibly might each make its own laws of war, in disregard of, and even in violation of, the laws of nations. Should any nation do so, its own citizens might not be able to help themselves, but sister powers might find in such laws sufficient cause of complaint under the *jus gentium*.

§ 469. **The Lottawanna.** The remedy was denied, under the rule of 1859, in the case of the Lottawanna;² and since the opinion in that case is elaborate, we may properly look to it to find the grounds upon which the Supreme Court claim the right to abrogate a remedy of the maritime law of nations.

The Lottawanna was a steamboat, plying upon the Mississippi and Red rivers. Two roustabouts, or steamboat men, seized and libelled her for "mariners' wages," and their lien upon the boat, with right of action *in rem*, was not questioned. But a sharp contest arose between two classes of intervenors: the one claiming the remnant (after satisfying the lien of the roustabouts,) for supplies, materials and repairs; the other claiming it to satisfy a custom-house mortgage. The seizure was prior to the adoption of the amended rule of 1872. The United States District Court, sitting in New Orleans, decided against the material men, and in favor of the mortgage creditors; the Circuit Court reversed this, on appeal, and decreed in favor of the material men. The case was then appealed to the

¹ The St. Lawrence, 1 Black, 527.

² The Lottawanna, 21 Wall. 558.

Supreme Court, again reversed, and the ruling of the District Court approved.

It was held that the material men had a lien enforceable *in rem* by the maritime law of nations, but that they had none under the *maritime law of the United States*. It was held that their claim could not be entertained by way of intervention for the surplus after the satisfaction of the river-men's libel for wages, because it had not been recorded as required by the Louisiana code; and a custom-house mortgage was foreclosed against that surplus, (it having been recorded,) though the court said the mortgagees had no maritime lien.

The present twelfth rule was in existence when this case was thus decided by the Supreme Court; and, though it was not when the suit was brought and when decided by the District Court in the first instance, yet, being now in existence, and permitting material men with recorded liens to libel vessels *in rem*, it necessarily treated the material men's lien as a maritime lien. If so, why should the custom-house mortgage have been allowed to outrank it? The custom-house mortgage was not pretended to have been given to the steamboat in necessity and to have acquired the nature of a bottomry bond; so, had it been undoubtedly an admiralty lien, it should not have outranked the admiralty lien of the material men. Yet it did not merely outrank it: it took the whole position; it was recognized and the repairer's lien rejected.

§ 470. **Recording Liens.** Would the court have rejected a bottomry claim because not recorded according to the Louisiana code? They did not require that the roustabouts should show that their lien for wages had been recorded: yet they might, under the wide words of the code, have held that bottomry bonds and seamen's liens must be recorded, just as plausibly as that the lien of material men must be, if the latter is an admiralty lien.

The code says: "No privilege shall have effect against third persons unless recorded, in the manner required by law, in the parish where the property to be affected is situated,"¹ following

¹ La. Revised Civil Code, Art. 3274. *Vide* Id. Arts. 3237, 3273, 3093.

the Constitution, which provides: "No mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated."¹

If those provisions are meant to apply to all admiralty and maritime liens and privileges, they would be meant to apply to seamen's wages as well as to the claims of material men; even to a contract expressly hypothecating a vessel. They would be so *meant* to apply—but that they would not legally so apply is as sure as that the Constitution vests admiralty and maritime jurisdiction outside of the states.

§ 471. **Municipal Modifications of Maritime Law.** Whether the intervening material men had an admiralty lien depends not upon the constitutional and statute provisions on the subject of recording liens, but upon the maritime law of nations. And the organ of the court admits the lien, if the latter is to govern; for he says, "The ground on which we are asked to overrule the judgment in the case of the *General Smith* is, that by the general maritime law, those who furnish necessary materials, repairs and supplies to a vessel upon her credit, have a lien on such a vessel therefor, as well when furnished in a home port as when furnished in a foreign port, and that the courts of admiralty are bound to give effect to that lien. The proposition assumes that the general maritime law governs this case, and is binding on the courts of the United States." He then proceeds to combat the proposition by exposing the assumption, arguing at length that this country has a maritime system of her own, and is not governed by the laws of the sea as recognized by the *jus gentium*. We may say, therefore, that he admits the lien to be one in admiralty, and therefore entitled to the admiralty remedy, if "the general maritime law" prevails in this country.

It is needless to follow him here, in his extended argument to show that each nation may make its own maritime law just as it makes its own municipal law, for this subject is not now the matter in hand; but it may be remarked *en passant*, that the argument would allow every State of our Union, as well as

¹ Constitution of La. of 1868, Art. 123.

every national state of the world, to mark the bounds between its municipal and the general maritime law. But the reader has gone enough into the case of the *Lottawanna* to see that the Supreme Court denied the maritime right of the material men, because they held it to be no more than an ordinary claim, lacking the dignity of a State lien for lack of record, though a good maritime lien if the general maritime law were in force in this country. The tendency now in England is towards the recognition of the general maritime law, as recognized on the continent.¹

§ 472. **Rulings of the Court where no lien Existed by State Law.** Whilst the opinion of the court in the *Lottawanna* case seems not so well grounded in reason as that of the dissenting opinion of Mr. Justice CLIFFORD, we must bow to authority. And we must further admit that it was more in accordance with previous decisions than was the dissenting opinion. And its doctrine has been since reaffirmed and followed.² Judge STORY held in a case,³ which came up from Maryland, that as no lien was created by the laws of that State, in favor of material men furnishing necessaries to a domestic ship in a home port, the United States District Court had no jurisdiction to proceed *in rem*, though it might have entertained a suit *in personam*, in admiralty, for the supplies, as "no doubt is entertained," said he, "that the admiralty rightfully possesses a general jurisdiction in cases of material men."

This view was reasserted in the case of *The Steamboat Planter*,⁴ when it was held: "As to repairs or necessaries in the port or State to which a ship belongs, the case is governed altogether by the local law of the State, and no lien is implied unless it is recognized by that law. But if the local law gives the lien, it may be enforced in the admiralty;" and so enforced, (as the opinion elsewhere shows,) by the action *in rem*.⁵

¹ The *Patria*, 3 Law Rep. (1871,) 461-2.

² The *Edith*, (4 Otto,) 94 U. S. 518; The *Kate Hinchman*, 7 Bissell, 238; The *Katie*, 3 Woods, 182; The *Albany*, 4 Dil. 439; The *Barque Great West*, 57 Ill. 168; The *Propeller Hil-*

ton, 62 Ill. 230; The *Skylark*, 2 Bis. 251; The *Lady Franklin*, Id. 121.

³ The *General Smith*, 4 Wh. 443.

⁴ *Peyroux v. Howard*, 7 Pet. 339; *Thompson, J.*

⁵ The case of the *General Smith* has been held to have been a decis-

But when, afterwards, it was attempted to enforce, by action *in rem* in admiralty, a steamboat captain's claim for wages, on the ground that the State law gave him a lien, Judge STORY held¹ that it could not be done, since, "by the maritime law the master has no lien on the ship, even for maritime wages;" and he explained that "the local laws can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of parties, and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States." But he declines to say whether, if the master has a lien by the State law, it can be enforced against a vessel, not owned in the State, for services rendered without the State. The reasoning and the intimation are not very satisfactory, but the ruling accords with his in the leading case—*The General Smith*.

Later, the Supreme Court held that a contract to furnish supplies to a domestic ship in her own State, was not subject to admiralty jurisdiction, and that, by a change in the twelfth admiralty rule, the right of proceeding *in rem* against a domestic vessel for supplies, repairs, etc., to enforce a State lien, had been taken away.² The language of Mr. Justice NELSON, the organ of the court, is so emphatic on the latter point, that we cannot doubt his conviction of the power of the court to abolish the *actio in rem*: "We have, at this term, amended the twelfth rule of the admiralty, so as to take from the district courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs which had been assumed upon the authority of the State laws, thereby correcting an error which had its origin in this court in the case of the *Gen. Smith*, applied and enforced in the case of *Peyroux and others v. Howard and Varion*, and afterwards partially corrected in the case of *The Steamboat Orleans v. Phebus*. * * * We have determined to leave all

ion that the case was governed by the local law of Maryland, and not by the maritime law at all. It was so considered in *The Robert Fulton*, 1 Paine, 625; *Thompson J.*; in *The Hilarity*, 1 Bl. & How. 90; *Betts, J.*; in *The Infanta*, 1 Abb. Ad. 267; *Betts,*

J.; in *The New Brig, Gilpin*, 473; *Hopkinson, J.*; and in *The President*, 4 Wash. 456; *Washington, J.*

¹ *The Steamboat Orleans*, 11 Pet. 184.

² *Maguire, Claimant of the Steamer Goliath, v. Card*, 21 How. 248.

these liens depending upon State laws, and not arising out of maritime contract, to be enforced by the State courts."

Soon after, the court repeated that such contracts for repairs and supplies are not maritime contracts, and that they are not to be enforced in admiralty, though a State give a lien;¹ but the organ of the court, Mr. Justice GRIER, distinguished the case he was deciding from that of *Peyreaux v. Howard*, saying that the latter was based on a lien given for repairs at New Orleans, within the flow of the tide, while the case of *Roach v. Chapman*, in which he was delivering the decision, rested on a Kentucky lien only. So, it will be seen by the reader, the extension of the admiralty to all navigable waters sponges out the line of demarkation drawn between the two cases.

It was held, in *The Feronia*,² that no rule of court could destroy the right of a libellant to his procedure *in rem* against a vessel; and, in *The Kate Tremaine*,³ that a proceeding *in rem* is not a mere remedy but a substantial right, of which, if a party is deprived, he, in effect, loses his lien; and, even in *The Lottawanna*, that a "lien is a right of property." We cannot see, therefore, by what authority the action with its coupled right, can be abrogated by a rule of court. It is certainly true that no court can, by rule, create maritime liens.⁴

Whether or not the remedy can be withheld, it is in existence under the present rule, and the courts now enforce state liens, for repairing or supplying vessels in a home port, by direct action against the lien-bearing vessel, though there was uncertainty before the adoption of the rule.⁵ A lien not maritime can only be asserted against proceeds.

¹ *Roach v. Chapman*, 22 How. 129.

² *The Feronia*, 17 Am. L. T. R. 622.

³ *The Kate Tremaine*, 5 Benedict, 69.

⁴ *The Bradish Johnson*, 3 Woods, 582.

⁵ *The John T. Moore*, 3 Woods, 61; *The B. Johnson*, Id. 582; *The Katie*, Id. 182; *The Superior*, 5 Saw. 346; *The Columbus*, 5 Saw. 489; *The Hiawatha*, 5 Saw. 160; *The Kate Hinch-*

man, 6 Bissell, 367; *The Grace Greenwood*, 2 Id. 131; *Stewart v. George*, 3 Hughes, 459; *The Daniel Augusta*, 3 Hughes, 464; *Scott's Case*, 1 Abb. (U. S.) 336; *Fuller v. Nickerson*, 69 Me. 228; *The Lady of the Ocean*, 70 Me. 350; *White's Bank v. Smith*, 7 Wall. 646; *Aldrich v. Etna Co.*, 8 Wall. 491; *Wilson v. Lawrence*, 18 Hun. 56; *The General Burnside*, XI. Law Reporter, (1881,) p. 147.

§ 473. **Liens Enforced when Arising in a Foreign Port, or in a State where the Vessel is not Owned.** The lien of material men is of high rank. Judge STORY placed it in advance of a bottomry bond of older date.¹ It is not divested by the sale of a ship to an innocent purchaser, without notice, provided it be asserted within a reasonable period.² It may be enforced against the proceeds of a vessel on which it lies, after her sale, in execution of a judgment, by the United States.³ But it cannot follow the vessel herself, after her judicial declaration of forfeiture; it would be satisfied out of the proceeds, in such case, should the material man make timely appearance and assert his lien by way of intervention, unless the case be one of prize. There is no implication of a lien upon a vessel, (when such lien is not expressed,) in a contract made by material men directly with the owner.⁴ But in their contracts with the master, the lien is implied. The master is not only the confidential agent of the owner, and therefore capable of binding the latter by his contracts with material men, and of binding the ship as primarily indebted for supplies and repairs received, but he stands towards third persons as the attorney in fact of the owner, by virtue of his office, without the exhibition of any power of attorney, when he has been appointed by the master, and when the contract is absolutely necessary.

The master, however, must not abuse his high trust. He must obligate the ship and freight for only such repairs and supplies as are reasonably necessary.⁵ To this extent it is said he may bind his principal even at the place of the owner's residence;⁶ but this is said to require an express hypothecation, except in case of shipwright, who retains possession of the ship which he has repaired.⁷

"The principle on which the owner is bound for the acts of the master," says Judge WARE,⁸ "is supposed to be borrowed by the maritime law directly from the exercitory action of the

¹ The Jerusalem, 2 Gal. 345.

² The Barque Chusan, 2 Story's R. 456.

³ The Scattergood, Gilpin's R. 1.

⁴ The St. Jago de Cuba, 9 Wh. 409.

⁵ The Fortitude, 3 Sum. 228.

⁶ Abbott on Shipping, Part ii., ch. 3.

⁷ Id.

⁸ The Phœbe, Ware, 265.

civil law. He is not liable in his character of owner or proprietor of the vessel, but as employer, for that is the meaning of the word *exercitor*. In that character he is responsible for the acts of the master, first, because he is his agent and is appointed by him, and subject to his orders; and, secondly, because he is entitled to the earnings of the vessel. The definition of *exercitor* is, the person who receives the earnings of the vessel. *Exercitorem autem eum dicimus ad quem obventiones et redditus omnes perveniunt.* Dig. 14. 1. 1. 15."

§ 474. Owners, Charterers, Etc. In the same case, the learned judge held that where the owner and a charterer shared together the profits of a voyage, they were "co-exercitors." But, where there was a charter party, and the owner had no interest in the earnings, the charterer is the principal of the master whom he employs, and is bound by his agent's acts and contracts, while the owner is not personally bound by them. And he cites several authorities,¹ to show the legal construction of partnership contracts between owners and charterers. In the first cited case, Judge PUTNAM held that, to render the owner of a vessel liable for the contracts of the master, it must be proved that the vessel was in the employment of the owner, that the master was appointed by him, and that the master acted, in making such contracts, within the scope of his authority. But this decision should not, we think, be considered of general application, since the presumption of authority must be generally held to attach to the master's office. The court was expounding a contract, amounting to this: The vessel to be at the risk of the owner, and, after deducting the first cost of the cargo, he was to have two-fifths of the net proceeds; the charterer to purchase the cargo at his own expense, and to victual and man the vessel. The charterer commanded the vessel himself. It was upon this contract that Judge PUTNAM decided as above stated.

In the second case cited, Chief Justice PARKER held that where one chartered a vessel for six months, rendering to the

¹ Reynolds v. Toppan, 15 Mass. 336; Thompson v. Snow, 4 Greenleaf, 370; Taggard v. Loring, 16 Mass. 268; Emery v. Hersey, Id. 407.

owners a moiety of her earnings, and sailed in her himself as master, he was *pro hac vice* the owner, so that he could not be charged with barratry, though his conduct was certainly barratrous if he were merely the master.

The subject of this chapter is so intimately interwoven with that of maritime liens in general, that it may here be relegated to the chapters that follow. The particular questions affecting it have been fully treated in the reports.¹

¹ A maritime lien is not implied in a ship-building contract, or one to furnish material for the construction of a vessel: *Peoples' Ferry Co. v. Beers*, 29 How. 393; *Roach v. Chapman*, 22 Id. 129; *Young v. The Ship Orpheus*, 2 Clifford, 29. Even if the work be the completion of the vessel after she has been launched: *The Iosco*, 1 Brown, 495; *Wilson v. Lawrence*, 82 N. Y. 409. But there are exceptions: *The Eliza Ladd*, *Deady*, 519. Material furnished for building a ship, even in a state where the owners do not reside, is subject to the same rule—there is no maritime lien: *Edwards v. Elliott*, 21 Wall. 552. The maritime lien arises when loans are made, in a foreign port, on the credit of the vessel, to pay for necessary repairs or supplies: *Crawford v. The William Penn.*, 3 Wash. C. C. R. 484; *The Emily B. Souder*, 17 Wall. 666; *The Bark J. F. Spencer*, 5 Benedict, 151; *The Brig Bridgewater*, *Olcott*, 35; *The Rigi*, *Law Rep.* 3 Eccl. & Ad. 516; *The Sarah Harris*, 7 Ben. 28, 177; *The Ship Fortitude*, 3 Sumn. 228; *The Nelson*, 1 Haggard, 169; *The Royal Stuart*, 2 Spink, 258; *The Grapeshot*, 9 Wall. 141; *Thomas v. Osborn*, 19 How. 29; *Davis v. Child*, *Daveis*, 171. In the enforcement of State liens for repairs and supplies, they are marshalled according to the maritime rule: *Hatton v. The Melita*, 3 Hughes, 494;

The Katie, 3 Woods, 182. But those for repairs or supplies in a foreign port have been given the higher rank: *The John T. Moore*, 3 Woods, 61; *The Bernard*, 2 Fed. Repr. 712; Though not invariably: *The Burnside*, 3 Fed. Repr. 228; *The De Wolf*, Id. 286; *The Daniel Brown*, 9 Ben. 309. State statutes giving the lien must be strictly followed, to render them enforceable in admiralty: *Boon v. Hornet*, *Crabbe*, 426; *In re Indiana*, Id. 479; *The New Brig*, *Gilpin*, 473. Residence of the owner, rather than place of enrollment of the vessel, determines whether the port is a home or foreign one: *The Alice Tainter*, 5 Ben. 391; *The Plymouth Rock*, 13 Blatch. 505; *The Golden Gate*, 1 Newb. 308; *The Bernard*, 2 Fed. Repr. 712. But see the *Walkrien*, 3 Ben. 394; *The George T. Kemp*, 2 Low. 478. The test of the lien is whether the credit is given to the ship or to its owners: *The Plymouth Rock*, 23 Int. Rev. Rec. 129; *The Williams*, 1 Brown, 208; *The A. R. Dunlap*, 1 Lowell, 350. If given to the ship, in case of necessity, though she be represented by other agent than the captain, she will be bound: *The Kalorama*, 10 Wall. 213; *The Guy*, 9 Id. 758; *The Commonwealth*, 20 Int. Rev. Rec. 64; *The Belle Lee*, 12 Id. 123; *The Walkrien* 3 Ben. 394. But see *The St. Jago de Cuba*, 9 Wheat. 417.

CHAPTER XLIV.

BOTTOMRY AND RESPONDENTIA.

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§ 475. **Nature and Requisites of the Bond.** Bottomry is the hypothecation of a ship's bottom to secure a marine risk. It is a contract between the borrower and lender of money, in a case of necessity for the salvation of the ship, in which the ship itself is bound for the payment. It is of the essence of such a contract that the risk be a maritime one, and taken by the lender of the money.¹ The risk must be that of both principal and interest.² The rate of interest is always large, in consideration of the risk of losing the money loaned. It is never governed by the statute interest of the place of contract. Indeed, it is not mere interest, in the ordinary legal use of the word. It is called, in the civil law, *periculi pretium*. The lender must take the hazard of the voyage upon himself; and his contingent compensation for so doing is in such sum as may be agreed upon. It has been said that the lender may receive any interest, however seemingly exorbitant.³ But it has

¹ Greeley v. Waterhouse, 1 App. 9, 295; Thorndike v. Stone, 11 Pick.

² Jennings v. Ins. Co. of Pa., 4 187.

Binn. 244; The Mary, Paine R. 671; ³ 2 Bl. Com. 457.

Rucker v. Conyngham, 2 Pet. Ad.

been held, in this country, that where the premium is "inflamed by extortion," the court will moderate it.¹

The bottomry contract is expressed in a bond which is called a bottomry bond. The condition of the obligation is that the ship be not lost on the voyage.² There is no language sacramental to such bond, and if the meaning of the contract be expressed, it will be sufficient. The court will interpret and construe such instruments liberally.³ It was held that where the obligation was thus expressed: "I bind myself, my ship and tackle, to pay the sum borrowed, with twelve per cent. bottomry premium, in eight days after my arrival at the port of London," the words "my arrival," meant the ship's arrival.⁴

The bond usually is for a voyage, though it may be for a given time, or for an indefinite period.⁵ The loan may have been in several installments, made from time to time, and the bond given to cover them all, without incurring illegality.⁶ Nor is the force or character of a bottomry bond deteriorated by the insertion of a clause of sale.⁷

§ 476. **Marine Interest.** Although marine interest is the object of the lender, yet it is not absolutely necessary that the rate should be stated in the bond, or that there should be any mention of interest; for if a sum is to be paid the obligee upon the safe arrival of the ship at the port of destination, it will be judicially presumed to cover both principal and interest.⁸ As we have previously said, the *periculi pretium* is not really interest, as the latter word is usually understood. It is an indemnity for the risk. If the bond fix the sum, to be contingently paid, at a figure even lower than the principal actually loaned, how could the courts allow more? What rule have they by which to say that, in addition to this stipulated sum, there must

¹ The Packet, 3 Mason, 225; The Virgin, 8 Pet. 538; The Hunter, Ware, 249.

² If a vessel, though wrecked, exists *in specie*, there is not "utter loss" such as was made the condition of the contract of bottomry and respondentia. Del. Ins. Co. v. Gassler, Holmes R. 475. -

² The Reliance, 3 Hagg. 66.

⁴ Simonds v. Hodgson, 3 B. & Ad. 50.

⁵ The Draco, 2 Sumner, 157; Thorndike v. Stone, 11 Pick. 183, 187.

⁶ The Virgin, 8 Pet. 538.

⁷ Robertson v. U. Ins. Co. 2 Johns. Cases, 250.

⁸ The Mary, Paine, 671.

be paid marine interest, (which has no legal limit or regulation,) or even legal interest?

Bottomry bonds are liberally construed by the courts.¹ They bind the ships' bottom, though there may be change of name, change of ownership and change of the ship's nationality;² and though change of ownership has not been recorded in the custom house, as required by law.³

The condition of the bond being that the obligation shall be void should the ship be lost, the lender can recover nothing on such bond when a total loss of the ship occurs; and it has been held that where the loan was to secure the voyage, and the conditions had reference to certain specified accidents, and the voyage was lost by one of those accidents, yet the borrower lost nothing, the bond was void.⁴ The facts of the case, (just cited,) may be thus briefly stated: The conditions of the bond were that if the vessel should perform the voyage, the bottomry loan and marine interest, (£150 with 3 per cent. interest per month,) should be paid twenty days after the termination of the voyage; but if she should be lost through perils of the sea, or by fire, or the enemies of the United States, the bond was to be void. The vessel was captured on the voyage and condemned as prize; but the decree was afterwards reversed, and the owner of the ship ultimately received full compensation. Yet it was held that the lender could not recover, in a suit upon the bond. He might, however, in a different suit; in an action for money had and received. We, however, incline to the opinion, that the lender, in his character of obligee, on his bottomry bond, ought to be allowed to follow the proceeds of the ship, just as he might follow the last plank saved from the wreck of one on which he had taken the marine risk. And the Supreme Court have virtually so held.⁵

¹ *Pope v. Nickerson*, 3 Story, 465.

² *The Catharine*, 1 Eng. Law and Eq. 679.

³ Rev. Stat. U. S., § 4192; *Hays v. Pacific Mail Ship Co.*, 17 How. 598; *White's Bank v. Smith*, 7 Wall. 646; *Aldrich v. Etna Com.* 8 Wall. 491; *Blanchard v. Brig Martha Washington*, 1 Cliff. 463; *Chadwick v. Baker*,

54 Me. 9; *Potter v. Irish*, 10 Gray, 416; *Hill v. Str. Golden Gate*, Newb. 308; *Mott v. Ruckman*, 3 Blatchf. 71; *Thompson v. Van Vechten*, 5 Abb. Pr. 458.

⁴ *Appleton v. Crowninshield*, 3 Mass. 443.

⁵ *Insurance Co. v. Gossler*, (6 Otto,) 96 U. S. 645.

By the action for money had and received, the lender may recover of the owner, where the master had been authorized to borrow money on the ship, though the bottomry bond was unwarrantably given by the master, it has been decided.¹

A contract was in the alternative: the bottomry bond to be satisfied within five days of the ship's arrival; or a bill of exchange on London, (for the amount named in the bond, drawn and delivered at the same time the bond was executed,) to be paid—the alternative at the borrower's option. It was held that as the borrower did not elect to pay the bill, the lender's action was on the bond.² A bond is not invalidated by reason of a bill of exchange being given for the same amount.³

The bottomry lien may be lost, if the lender fail to assert and enforce it, till the ship make several voyages after it has become exigible, if executions are then levied upon her.⁴ It has even been held that where the ship is permitted to go to sea upon a second voyage, without any attempt on the part of the lender to enforce his lien, it is a waiver.⁵

§ 477. **The Necessity that Justifies the Loan.** Necessity is the only authorization and justification of a contract so extraordinary as that of bottomry.⁶ The safety or safe conduct of the ship is the justifying reason for borrowing money at bottomry rates. The absolutely essential repairs, supplies and other means of getting the ship home, may render such borrowing indispensable. The master cannot borrow upon the ship's bottom at the expense of his principal, if he has money of his own, or of his principal, in hand.⁷ Nor when the owner's personal credit is such, at the port of distress, that the master might borrow, in his principal's name, upon better terms than those of bottomry.⁸ Nor when the owner is present, or within communicable distance. If he can consult the owner by electric telegraph, he ought to do so, before entering

¹ *Hurry v. Hurry*, 2 Wash. C. C. 145.

² *The Zephyr*, 3 Mason, 341.

³ *The Hunter*, Ware, 249.

⁴ *Blaine v. The Charles Carter*, 4 Cr. 328.

⁵ *The Aurora*, 1 Wh. 104.

⁶ *The Hersey*, 3 Hagg, 404; *The Fortitude*, 3 Sumn. 234.

⁷ *Cupisino v. Perez*, 2 Dal. 195; *The Packet*, 3 Mason, 255.

⁸ *Forbes v. The Hannah*, Bee, 348.

into the bottomry contract. If necessity warrant, the master may hypothecate the vessel at the port of destination, as well as at a foreign port.¹ A ship owned in Virginia may be hypothecated in New York,² but not at the port of departure.³ The master cannot bind the ship for prior advances not made for her safety. When a voyage is broken up, the master may hypothecate the ship to get money to take her home.⁴

§ 478. **When the Master has the Authority to Hypothecate.** The master must have been appointed by the ship's owner, in order to have authority to hypothecate her so as to bind her under the hard contract of bottomry. It has been held that if the master had resigned and another had succeeded without appointment by the owner, the bottomry contract made by the succeeding master did not bind the owner.⁵ We have no doubt it would bind the ship, if the appointed master died or resigned in a distant port, and the mate succeeded as a matter of necessity.

The validity of the bottomry contract is not impaired by irregular previous conduct towards the owner, by the master, if the lender knew nothing of it, and contracted with the master, in good faith, when necessity warranted the transaction.⁶

The master, under his general authority as the ship's husband, can bind only the ship by a bottomry bond; he cannot render the owners personally liable. If the ship prove insufficient to pay the debt, the lender must lose the difference between the debt and the ship's value.⁷ It would require a power of attorney from the owners, to enable the master to bind them personally: and this would not be bottomry; for it is essential to the latter that the loan be on the credit of the ship.⁸

§ 479. **Hypothecation by the Owner.** When the owner of

¹ *Reade v. Com. Ins. Co.*, 3 Johns. 352.

² *Selden v. Hendrickson*, 1 Brock. 396.

³ *Sloan v. Ship A. E. I., Bee's R.* 250; *Turnbull v. Enterprise*, Id. 345.

⁴ *Crawford v. The Wm. Penn.*, 3 Wash. C. C. 484.

⁵ *Walden v. Chamberlain*, 3 Wash. C. C. 290.

⁶ *Canizares v. Santissima Trinidad*, Bee, 361; *Wilmer v. The Smilax*, 2 Pet. Ad. 300; *The Virgin*, 8 Pet. 538.

⁷ *The Virgin*, 8 Pet. 538.

⁸ *The Augusta*, 1 Dods. 233.

the ship hypothecates her bottom, the bond given will be valid, though there may have been no necessity for the hypothecation.¹ But we think this is true only between the parties to the contract. In case of a *concursum*, we do not think the bottomry bond, in such case, should be assigned its high rank among other claims. As to third persons, such unnecessary bottomry should be treated as an ordinary contract. The reasons that give the marine hypothecation such high rank are inapplicable, where there is no necessity for making it. If the rank were allowed in such case, it would open a door for fraud.

One part-owner cannot loan money on bottomry, at a high premium, to the master in distress, so as to bind his co-partner.² Sole owners may hypothecate in a foreign port, even for the purpose of getting money to purchase a cargo, it is said:³ but would this be bottomry, as understood in the civil and the maritime law? We think not. The reason given for the decision last cited, is that the owner has "absolute control over his own property:" a very good one, for a common law contract, but not sufficient to give his hypothecation the rank to which bottomry bonds are entitled. And we make the same qualification to a decision sustaining a so-called bottomry bond, given by the owner to the master to secure his wages.⁴

§ 480. **How far the Lender must Inquire into the Necessity.** The lender, it is held, must not be a debtor to the vessel when the loan is made.⁵ As a creditor, he cannot secure his previous advances by including them in the sum loaned upon the ship's credit secured by a bottomry bond; for, in such case, only the money risked would be really covered by such bond and recoverable.⁶ It has been held, however, in this country, that a creditor may advance money to relieve a ship from seizure to enforce liens, and have his advances for this purpose secured, with marine interest, and the hypothecation of the ship's bottom, by the master of the vessel.⁷ And this is reasonable, since there is

¹ The Draco, 2 Sumner, 157.

² Patton v. The Randolph, Gil. 457.

³ The Mary, Paine, 671.

⁴ Miller v. The Rebecca, Bee, 151.

⁵ The Hebe, 2 W. Rob. Adm. 146.

⁶ The Prince George, 4 Moore P. C. 21.

⁷ The Aurora, 1 Wh. 96.

necessity, (the touch-stone to test the validity of bottomry bonds,) to warrant such action. But the case cited does not go so far as to protect the lender under such extraordinary contract, where there is merely a threat of arresting the vessel for a debt pre-existing.

A consignee, if bound to advance freight upon the cargo, cannot, while indebted for it, become a lender on marine interest under the bottomry risk.¹ Where the emergency warrants it, an agent of a ship may take a bottomry bond of the captain.² But not so, where the necessity does not exist.³

§ 481. **Proceedings, Pleadings, Evidence, Etc.** A suit *in rem*, upon a bottomry bond, is instituted by obtaining from a District Court of the United States, an admiralty warrant for the seizure of the vessel, upon proper showing made. Such proper showing would be the exhibition of the bond and an affidavit to the necessary facts. The libel should be presented to the court and the suit regularly instituted, unless necessity should warrant the arrest of the *res* previous to the filing of the libel.

The libel should state the nature of the cause; that it is a cause civil and maritime; that it is upon a bottomry bond; and there should be a brief statement of the obligation, and of the conditions, and of the maturity of the obligation. The ship should be alleged to be within the district. The facts should be propounded in distinct articles, as in other admiralty pleadings. And there should be a prayer for process *in rem* for the ship's arrest, and for judgment in the sum nominated in the bond, for costs and general relief. Answer on oath, to interrogations, may be required of the respondent. These and other proceedings are according to the usual course in admiralty suits, except that there are some peculiarities with regard to the *onus probandi*.

The burden of proof is upon the libellant and lender of the money, where there is any question as to the necessity of the loan. He was bound to the exercise of due diligence to ascer-

¹ The *Lavinia v. Barclay*, 1 Wash. C. C. 49.

² The *Oriental*, 2 Eng. Law and Eq. 546.

³ The *Wave*, 4 Eng. L. and Eq. 589.

tain whether the supplies or repairs for which he advanced money, was necessary. There must have been, at least, an apparent necessity.¹ It has been repeatedly held that to make a bottomry bond a valid hypothecation of the ship, the obligee must show that the advances were necessary to effect the objects of the voyage, or the safety of the ship.²

The *onus* would not seem to be on the obligee, however, when the owner, appearing as respondent, has not denied the authority, or expressly repudiated the act of the master as unwarrantable under the circumstances.

The burden is on the libellee, or borrower, if he defends the ship on the ground that the master had funds which he might have used and thus avoided the necessity of hypothecating the ship's bottom; or that he, the owner, had credit at the place of contract which could have been made available by the master so as to avoid the bottomry contract.³

§ 482. **Rank.** When there is a contest, between libellants and intervenors, as to the rank of their respective liens, that for seaman's wages is above that of bottomry;⁴ also that for salvage.

Next in order is the lien of material men.⁵

The bottomry lien is next in rank. And where there are more than one such lien, the latest is first in rank, since, had the ship been lost for want of the last loan, all the previous loans would have been lost. But when a later has been executed to pay a former, it must stand or fall with the former.⁶ A valid bottomry bond will be preferred to the claim of a purchaser without notice;⁷ and to a mortgage without possession, though the bottomry bond is made at a later date than the mortgage—the lender having no notice of the mortgage.⁸ But one cannot successfully intervene, upon a bottomry bond, in a

¹ *Ship Fortitude*, 3 Sumn. 228.

² *Putnam v. The Polly*, Bee. 157; *The Golden Rose*, Id. 131; *The Aurora*, 1 Wh. 86; *Rucker v. Conyng-ham*, 2 Pet. Ad. 295; *Hurry v. The John and Alice*, 1 Wash. C. C. 293; *Walden v. Chamberlin*, 3 Id. 290; *Crawford v. The Wm. Penn*, Id. 484;

The Mary, Paine, 671; *Patton v. The Randolph*, Gilpin, 457.

³ *The Ship Fortitude*, 3 Sumn. 228.

⁴ *The Virgin*, 8 Pet. 538.

⁵ *The Jerusalem*, 2 Gal. 345.

⁶ *The Aurora*, 1 Wh. 96.

⁷ *The Draco*, 2 Sumn. 157.

⁸ *The Mary*, Paine, 671.

prize cause.¹ However, a bottomry contract, made with an enemy, to repair a cartel ship in an enemy's port, may be enforced in the admiralty.² We do not mean to say that such contract made with an enemy, or, indeed, any bottomry contract whatever, could be enforced against a prize vessel. For manifest reasons, set forth sufficiently in our book on *Things Hostile*, no lien whatever can compete with the captor's right.

§ 483. **The Nature and Requisites of the Respondentia Bond.** *Respondentia* is a loan on the cargo of a vessel, bearing marine interest, with the payment contingent on the safe arrival of the cargo at the port of destination. It is evidenced by a bond conditioned as above stated.³

Necessity is the justification of the bond.⁴ The master may hypothecate the cargo, (as well as the ship and freight,) for advances necessary to repair and provision the ship.⁵ And he may do so, though he has money of the shippers in his hands, where hypothecation is necessary to secure needed repairs.⁶

But the master ought to communicate with the owner of the cargo, if practicable, before hypothecating it by *respondentia* bond.⁷ It seems plain that the justifying necessity would be wanting, if the master were in Liverpool with the cargo proposed to be hypothecated, and the owner of it in New York, where he could be readily cabled. But, if no answer should be received, circumstances might warrant the master in subjecting the cargo to the lien. As to third persons, his authority would be presumed; but, as to the owners of the cargo, the captain might be held, by them, responsible for any loss incurred by reason of his failure to telegraph them.

Cargo was held not to be included in a bond, though the

¹ *The Mary*, 9 Cr. 126; *The Francis*, 8 Cr. 420.

² *Crawford v. The Wm. Penn*, Pet. C. C. 106.

³ See form, Post.

⁴ *The Jacob*, 4 Rob. Ad. 245; *The Lord Cochrane*, 2 W. Rob. Ad. 320.

⁵ *The Packet*, 3 Mason, 255; *Murray v. Lazarus*, Paine, 572; *Ross v. The Active*, 2 Wash. C. C. 226; *Ins.*

Co. v. Gossler, (6 Otto.) 96 U. S. 651; *The Zephyr*, 3 Mason, 343; *Searle v. Scovell*, 4 Johns. (N. Y.) Ch. 218; *The Am. Ins. Co. v. Coster*, 3 Paige, 323.

⁶ *The Packet*, 3 Mason, 255.

⁷ *The Julia Blake*, 16 Blatchf. 472. But this has been questioned; *The Eureka*, 2 Low. 417.

written instrument recited that the master was compelled to take loan on ship, freight and cargo.¹ That the lender must run the risk of the voyage, is of the essence of the respondentia contract, as of that of bottomry.² Such bond does not transfer right of property in the goods.³

The condition of such bond is sometimes that the goods shall be safely returned, with no mention of the ship's safe arrival; in such case, the borrower must pay, if he receive his goods safely, though by another vessel.⁴ The words, "utter loss of the ship," in such a bond, mean not a constructive, but an actual loss.⁵ If the contract be that the lender shall be liable to average and entitled to the benefit of salvage, like underwriters on an insurance policy, the borrower cannot calculate an average loss on the whole amount of the loan and maritime interest, but he must confine himself to the insurance premium and the costs and charges of the goods on board the vessel.⁶

There is nothing sacramental in the terms, "lost," or "not lost," in a respondentia bond. Equivalent words are just as binding; but the risk of the obligee must be expressed.

§ 484. **Form of Bond, and the Obligations.** The form of the respondentia bond may be varied, but the substance must embrace the following requisites:

1. It must contain the names of the lender and the borrower.
2. The names of the master and the ship—with further description of the ship, if necessary to her identity.
3. The sum of money and the marine interest, the subject of the contract.
4. The proposed voyage.
5. The time in which the risk is to run.
6. The merchandise or thing at risk.⁷

Judge STORY has held that a contract of respondentia is to be considered as a contract to risk so much of the amount lent

¹ The Zephyr, 3 Mason, 341.

² Thorndike v. Stone, 11 Pick. 187.

³ United States v. Del. Ins. Co., 4 Wash. C. C. 418.

⁴ Ins. Co. of Pa. v. Duval, 8 S. &

R. 138; Gibson v. Phil. Ins. Co., 1 Binney, 405.

⁵ Id.

⁶ Gibson v. Phil. Ins. Co., 1 Binney, 405.

⁷ Marshall on Insurance, ii., 738.

as shall be covered by the property on board ship. If goods less than the amount of the loan are on board, the risk is *pro tanto*¹ The civilians observed this rule, as expressed by Emerigon: "Where the borrower is unable or unwilling to ship goods to the value of the sum borrowed, the contract, in case of loss, shall be diminished in proportion to the goods shipped, and shall only be valid as to the surplus, for which the borrower shall pay interest according to the custom of the place where it was executed, together with the principal."²

It has been held that the owner may borrow, when there is no necessity with regard to ship or cargo, and yet the bond be valid.³ But would such bond be really a bottomry or respondentia bond?

It is essential that the money borrowed be at the risk of the lender, in order to entitle him to marine interest, without usury; and the mere form of a bottomry or respondentia bond would not avail as a cloak to cover a usurious contract.⁴

The owner may borrow money of a consignee; but the latter has no right to bind the owner, on marine insurance, before his payment of the freight due on the cargo.⁵

§ 485. **The Loan.** As to the time when a respondentia bond must be made, it need not be before the commencement of the voyage; nor need it, (as to the necessity,) be given for fitting the ship for the voyage.⁶

When the sailing precedes the loan, it does not, in itself, afford presumption that the contract is a gambling one, or the interest usurious. However, if there were no goods on board at the time of the sailing, to the value of the subsequent loan, and at the lender's risk, the contract of loan would be deemed a gambling one.⁷ Marshall refers to the French ordinances, and the statute of 19 George II., c. 37, to prevent gambling

¹ Franklin Ins. Co. v. Lord, 4 Mason, 254.

² Emerigon on Maritime Loans, (Hall's) p. 149; 2 Emerigon, Contracts a la Grosse, Ch. 6, § 1, p. 495; Com. Code, B. 2., tit. ix., art. 329; 2 Valin, lib. 3., tit. v., art. 14.

³ The Draco, 2 Sumn. 157.

⁴ 2 Marshall on Insurance, 749.

⁵ The Lavinia v. Barclay, 1 Wash. C. C. 49.

⁶ Conard v. Atlantic Ins. Co., 1 Pet. 437; United States v. Del. Ins. Co., 4 Wash. C. C. 418; Del. Ins. Co. v. Archer, 3 Rawle, 216.

⁷ 2 Marshall on Ins., p. 743.

marine contracts, by which such transaction was prohibited. "It is of the essence of this contract," he says, "that the money lent, or something equivalent to it, be exposed to the perils of the sea, at the risk of the lender. * * * If the borrower have no effects on board, or he borrowed much beyond their value, and agrees to pay a high marine interest, this affords a strong ground to suspect fraud, and that the voyage will have an unfavorable end." But there is nothing anomalous in this: for any other contract, as well as that of respondentia, would be vitiated by fraud.

But, where the loan is made in good faith though after the ship's departure from port; where there is no usurious interest nor gambling transaction, it seems neither illegal nor impolitic for a loan to be made after the departure, and a respondentia bond taken. Such a contract of loan may not fully accord with the civil law *pecunia trajecticia*, but it may be of commercial utility, and not at all antagonistic to the Roman usage.

§ 486. **Lien on the Homeward Cargo.** A respondentia bond on goods to be laden at any time during the voyage, gives the lender a *lien* on the homeward cargo.¹ It must be construed with any memoranda indorsed upon it by the contracting parties, and with the outward bill of lading and any assignment thereof; and the intention of the contracting parties appearing from the several documents, must govern. If it thus appears that both the outward and homeward cargoes are hypothecated for the loan, there seems no ground to object to the contract that it was made during the voyage. The delivery of the homeward bill of lading to the lender on respondentia, after the ship's arrival, seems equivalent to a direct assignment. And it is held that a respondentia bond on a cargo to secure a debt is valid—but the risk must, of course, be that of the lender.² "If," says Judge STORY, in *Conard v. Atlantic Ins. Co.*,³ "the assignment had been of the outward shipment of goods only, it would have carried the return cargo purchased

¹ The *Julia Blake*, 16 Blatchf. 472. See with reference to the master's authority.

² *Atlantic Ins. Co., v. Conard*, 4 Wash. C. C. 662; *Conard v. Atlantic Ins. Co.*, 1 Peters, 381.

³ Id. 448.

with the proceeds; because the product or substitute for the original thing, by sale or otherwise, follows the nature of the thing itself, so long as it can be ascertained to be such, and becomes the property of him who was the owner in the same quality as he held the thing. This is the general principle of law, and has even been extended to cases where there has been a fraudulent or tortious misapplication of property."¹

But it has been said, in England, that there seems to be no mode by which the lender at *respondentia*, on merchandise either laden or to be laden on an outward and homeward voyage, can enforce his lien on the goods that may be brought back.²

Marine insurance should not be confounded with either bottomry or *respondentia*.³

¹ Taylor v. Plummer, 3 Maul. & Selw. 562, and authorities therein cited by Lord Ellenborough, are referred to by Judge Story, in support of this principle.

² Abbott on Shipping, 153. See Black. Com., book II., p. 458; Busk

v. Fearon, 4 East. 319; Glover v. Black, 3 Burr. 1394.

³ It has been held that there is no lien, enforceable in admiralty, for an insurance premium: The John T. Moore, 3 Woods, 61. But see The Dolphin, 9 Chicago Legal News, 337; The Guiding Star, 9 Fed. Repr. 521.

CHAPTER XLV.

WAGES OF SEAMEN AND RIVERMEN.

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§ 487. **The Seaman's Maritime Lien for Wages.** The lien of seamen for wages, under the marine law, is fully held by the civilians.¹ It is affirmed by the *Code de Commerce* and the Marine Ordinance of France.² It is also affirmed by the laws of Spain and Portugal;³ so also by the laws of Holland.⁴ In England the maritime law of seamen's liens is the same as over continental Europe, and the Laws of Oleron still furnish the groundwork of the law. Cleirac, in his commentary on those laws, says, "If the merchant fails in the time of payment and causes delay, the master or mariners are privileged to cause the goods which they have carried to be seized, and to be sold to the amount that is due to them;"⁵ so that the lien extended to

¹ Emerigon, *Traite Des Assurances*, Tome 2, c. 17, s. 11, § 2; Bonlay Paty, *Cours de Droit Com. Maritime*, ii., p. 223; Boucher, *Droit Maritime*, part 3, s. 7, §§ 1159, 1160; Voet ad *Pandectas*, lib. 20, tit. ii., § 30, in which he cites Grotius.

² *Code de Commerce*, s. 271; *Marine Ordinance of Louis XIV.*, liv. 3,

tit. iv., art. 19.

³ Jacobson's *Sea Laws*, 150; Ingersoll's *Roccus*, not. 91. See 1 Valin, 752.

⁴ Voet et *Pandectas*, lib. 20, tit. ii., § 30.

⁵ *Les Us et contumes de la mer*, *Navigation des Rivières*, arts. 18, 19; *Jurisdiction de la Marine*, p. 351.

the freight by those laws, as it has in many countries. In this country, the maxim "Freight is the mother of wages," has lost its significance in great part, by the statute which secures the wages whether freight is earned or not.¹ When it is earned, the lien for wages rests upon it, as well as upon the ship; and there is a third remedy: suit against the ship's owner upon the contract evidenced by the shipping articles.² The law is succinctly expressed in the thirteenth Admiralty rule adopted by the Supreme Court: "In all suits for mariner's wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or master alone *in personam*."

Although the mariner has these three remedies, yet he is not bound to pay any attention to the ownership of the vessel, nor to follow the estate of the deceased owner, into the probate court, to have the wages allowed contradictorily with other creditors,³ unless he shall have elected to pursue his personal remedy.

His action *in rem* lying against both the ship and cargo, he may seize and libel one or both. If his service has been rendered upon a fishing voyage, he has a lien upon the fish caught and may bring his action against them; and he may even follow the proceeds of the fish after they have been sold.⁴ And the whaler has a lien upon the oil for his wages.⁵

The master of a fishing vessel had hired her of the owners and agreed to pay the seamen; but, the vessel having been lost, it was held that the seamen, in the exercise of their remedy *in rem*, could pursue the fund arising from the sale of the wreck, into the admiralty court, though the wreck itself had never been within the district of that court.⁶

The seaman's lien is held to be not assignable.⁷

This lien is first in rank, except in salvage suits. It has

¹ Rev. Stat., § 4525; Act 1872, 17 Stat. at L., 268.

² Sheppard v. Taylor, 5 Pet. 675; Bronde v. Haven, 1 Gilpin's R. 592; Brown v. Lull, 2 Sumner, 443; Pitman v. Hooper, 3 Sum. 50.

³ The Fanny Gardner, 5 Bissell, 209.

⁴ Re Low, 2 Low. 264.

⁵ The Antelope, 1 Low. 130.

⁶ Flaherty v. Doane, 1 Low. 148.

⁷ The Patchin, 12 Law Reporter, 21.

priority to bottomry bonds and *respondentia*.¹ It has been held to travel with the ship, even after her forfeiture and condemnation,² though we do not wish to be understood as assenting to the cases which we cite on this point.

§ 488. **Wages.** Wages commence to be earned when the seaman begins to work, or the time specified in the shipping articles for commencing to work. They do not depend upon the fact of the vessel's earning freight, as formerly was the rule, and as is now the rule in other countries; but should seamen fail to exert themselves to save the vessel and cargo, there would be loss of wages. Where the voyage ends by reason of the loss of the vessel, before the date of the termination of the agreement, wages are recoverable only to the time of such loss,³ but the action would necessarily be a personal one. When an articulated seaman is, without his consent, and without fault on his part, discharged before a month's wages have been earned, he is entitled to what he has earned and a month's wages in addition, and may recover more upon proof of greater damage. He loses his pay for such time as he may be lawfully suspended from work by imprisonment, and for such time as he may refuse to do service.⁴

Wages are due two days from the termination of the agreement, or from a seaman's discharge, where the contract was for a voyage between ports of the Pacific and of the Atlantic oceans; where it was for foreign voyages, wages are due three days from the delivery of the cargo or five after his discharge, "whichever first happens;" and he is entitled to one-fourth his dues at the time of his discharge. He is entitled to double pay for each day, (not exceeding ten,) in which he may be kept out of his dues. To all this paragraph the proviso applies, that if the seaman is a sharer in the profits of the voyage, these provisions are inapplicable to him.⁵ Congress probably meant our own ports on the Atlantic and Pacific coasts, since, otherwise the word "foreign" would need qualification.

¹ The Favorite, 2 Rob. 232.

⁴ Revised Statutes, §§ 4524-5-6-7-

² The St. Jago de Cuba, 9 Wh. 409;
Pitman v. Hooper, 3 Sum. 51.

8; Act of 1872, 17 Stat. at L. 268.

⁵ R. S. 4529; Act, 1790, 1 Stat. at L.

³ The Reliance, 2 Wm. Rob. 119.

133; Act 1872, 17 Stat. at L. 269.

One-third the wages then due, must be paid the seaman, (unless there is an agreement to the contrary,) whenever cargo is delivered during the voyage; and all the wages become due at the last port of delivery when the cargo or ballast has been fully discharged,¹ though *payable* as above stated.

To protect the sailor from imposition, the statute prohibits any advances to be made to him, except under strict regulations, which we need not here present.²

For his wages, (except where he has by agreements authorized by the statute, deprived himself of his rights,) his lien upon the ship cannot be forfeited by him. Stipulations by him to that effect are made void by the statute.³ Wages are not attachable for the seaman's debt; he can collect them though he may have previously assigned them.⁴ Only one dollar of his wages for the voyage can be recovered against him, till the end of the voyage, for a debt contracted during the time of his employment.⁵ There are various other provisions, relating to the effects of deceased sailors, the duties of the master and of consular officers with regard to such effects, the payment of the wages of deceased soldiers, and the disposition of seamen's money and effects by the courts, which will be found in the 53d Title of the Revised Statutes, Sections 4538 to 4545.

It has been held that his wages are due for the whole voyage, when a seaman has died during the voyage;⁶ and it has been held to the contrary,⁷ seemingly with more plausibility. But disability to work, on account of sickness occurring after the inception of the voyage, ought not to lessen the wages.⁸

Seamen forfeit their wages, if guilty of revolt, frequent disobedience or habitual drunkenness.⁹ And for desertion.¹⁰ And

¹ R. S. 4530: Act, 1790, Id.

² R. S. 4531-2-3-4.

³ R. S. 4535.

⁴ R. S. 4536.

⁵ R. S. 4537.

⁶ *Walton v. The Neptune*, 1 Pet. Adm. 142; *Scott v. The Greenwich*, Id. 155; *Simms v. Jackson*, 1 Wash. C. C. 414.

⁷ *Carey v. The Kitty*, Bee R. 255;

Natterstram v. The Hazard, Id. 441.

⁸ 3 Kent's Com. 186.

⁹ *The Mentor*, 4 Mason, 84-90; *The New Phoenix*, 2 Haggard, 420; *The Blake*, 1 Wm. Rob. 73; *Orne v. Townsend*, 4 Mason, 541; *The New Phoenix*, 1 Haggard, 198; *The Lady Campbell*, 2 Haggard, 5; *The Gondolier*, 3 Haggard, 190.

¹⁰ 3 Kent's Com. 198.

in case of embezzlement of a part of the cargo, the seaman guilty of it may be made to contribute to the loss, by a forfeiture of a part or the whole of his wages.¹ But the master has power to remit forfeitures for misconduct.²

§ 489. **When an Action In Rem to Enforce Seamen's Lien Will Lie.** The right of action against the ship *in rem* is not to be exercised until the wages have been due ten days, unless she is about to depart from the port at an earlier day. The ten days begin to run at the termination of the round voyage, where the unloading is to be done by stevedores or others, as is now usually the case. Where the contract requires the seamen to unload, the time of delay does not commence till their work is done and the wages fully earned.³ The time has been supposed to be abridged by the happening of a dispute between the master and the seamen;⁴ though, under such a construction of the statute, the sailors might facilitate their suit by a quarrel at pleasure. The object of the allowance of the ten days being to afford time for collection, by the ship, of the dues for freight,⁵ there would seem to be as much reason for delay when there is a dispute as when there is none. But the statute seems clearly to provide that if the master allows ten days to pass by, after the wages have become due; or if, before the expiration of that time, he disputes the claim of the seamen, so as to render suit necessary, in either case, the right of action may be exercised at once, though the contrary has been held.⁶

§ 490. **The Rule to Show Cause Preliminary to Seizure.** A rule to show cause why suit *in rem* should not be instituted, is required by the statute, as a preliminary proceeding in suits by seamen for their wages. The statute requires that such rule shall be taken by the seamen, against the master, requiring him to show cause why process should not issue against the vessel; and, in case he fail to show payment, forfeiture or some other

¹ Abbott on Shipping, 778; *Spur v. Pearson*, 1 Mason, 104; 3 Kent's Com. 194.

² 3 Kent's Com. 198.

³ *The Mary*, Ware's R. 454; *The Happy Return*, 1 Pet. Adm. 255; *The*

Sussex, Id. 165; *The Philadelphia*, Id. 210; *The Annie M. Small*, 2 Sawyer, 226; *The Columbia*, 6 Ben. 398.

⁴ Betts' Ad. Prac. 62.

⁵ *The Susan*, 1 Pet. Ad. 165.

⁶ Dunlap's Ad. Prac. 106.

sufficient cause, the court shall certify to the clerk "that there is sufficient cause of complaint whereon to found admiralty process; and, thereupon, the clerk shall issue process against the vessel and the suit shall be proceeded on in court, and final judgment shall be given according to the usual course of admiralty courts in such cases."¹ In case the master neglect to appear, the seizure would be ordered.²

This preliminary proceeding is peculiar to seamen's suits, and doubtless it has been devised to save them from ill-considered litigation, and to induce settlements of disputed accounts between them and the master of the vessel. It seems to be a provision both wise and beneficent, so far as we have set it forth; and there can be no doubt of the right of the legislator to require the rule *nisi* to precede the resort to the legal remedy.³

§ 491. **Whether State Magistrates may Try the Preliminary Rule.** Whether State magistrates may try such admiralty rule, is the next inquiry. The statute expressly authorizes them to do so, in the absence of the judge of the United States District Court, and also, when he lives more than three miles from the ship sought to be seized.

"Whenever the wages of any seaman are not paid within ten days after the time when the same ought to be paid according to the provisions of this title, or any dispute arises between the master and the seamen, touching wages, the judge for the judicial district where the vessel is, or in case his residence be more than three miles from the place, or he be absent from the place of his residence, then any judge or justice of the peace, or any commissioner of a Circuit Court, may summon the master of such vessel to appear before him, to show cause why process should not issue against such vessel, her tackle, apparel

¹ Rev. Stat. § 4546; Act 1790, 1 Stat. at L. 133; Act 1842, 5 Stat. at L. 517.

² Id.

³ A libel for seamen's wages may be filed, and process for the arrest of

the vessel obtained, without resort to the preliminary proceedings authorized by sections 4546 and 4547, of the Revised Statutes. Such proceedings are not exclusive, but cumulative merely. The Waverly, 7 Bissell, 465.

and furniture, according to the course of admiralty courts, to answer for the wages."¹

"If the master against whom such summons is issued neglects to appear, or appearing, does not show that the wages are paid or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, the judge or justice, or commissioner shall certify to the clerk of the District Court that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk of such court shall issue process against the vessel,"² etc.

The power sought to be conferred upon State magistrates and United States Circuit Court Commissioners is that of serving a rule on the master of a ship to show cause why a suit *in rem* should not be instituted; that of hearing evidence, and of deciding such rule; and that of issuing a certificate to the clerk of the Federal District Court preliminary to the issuing of process against the ship by the latter officer.

This power is to be exercised:

1. If the seamen's wages are not paid within ten days after they have become due.

2. If any dispute arises between the master and seamen touching the latter's wages.

The power is to be exercised only when the district judge is absent, or when he resides more than three miles from the place where the vessel is, upon which the wages were earned.

The exact language of the statute, (R. S. 4546 and 4547,) prescribing what the State magistrate may do, is that he "may summon the master of such vessel to appear before him, to show cause why process should not issue against such vessel, her tackle, apparel and furniture, according to the course of the admiralty courts, to answer for the wages. If the master, against whom such summons is issued, neglects to appear, or,

¹ Rev. Stat. tit. liii., § 4546; Act 1790, 1 Stat. at L. 133; Act 1842, 5 Stat. at L. 517.

² Id. § 4547; The William Harris, Ware R. 367; The Neptune, 1 Pet. Ad. 183; The Steamboat London, 1 Newb. 6; The Commerce, 1 Sprague,

34; Collins v. Nickerson, Id. 126; The Ship Wm. Jarvis, Id. 485; Oliver v. Alexander, 6 Pet. 143; The Cypress, Blatchf. and H. Rep. 83; The Cadmus, Id. 139; The Warrington, Id. 335; Freeman v. Baker, Id. 372; The Sch. David Faust, 1 Ben. 183.

appearing, does not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, the judge, or justice or commissioner shall certify to the clerk of the District Court that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk of such court shall issue process against the vessel, and the suit shall be proceeded on in the court," etc.

§ 492. **Certificate from State Magistrate.** The language is imperative. The State magistrate or Federal commissioner *shall* certify that there is cause for seizure and the clerk *shall* then issue process against the vessel. The very important function of deciding whether there shall be an admiralty seizure *in rem* is given to a justice of the peace.

It is true the word *may* is used as the auxiliary of "summon," but in case the justice should choose to act and to summon the master, the latter is liable to be defaulted for non-appearance, so far as to have the admiralty rule decided against him. Once having accepted this doubtful trust from Congress, the justice *shall* certify to the clerk, if the evidence he has taken should satisfy his judicial mind that an admiralty case *in rem* would lie. Should he be satisfied to the contrary, is the seaman to be denied his right to enforce his lien? If so, here is admiralty jurisdiction conferred in contravention of the Constitution. Is the clerk bound to obey the order implied by the certificate? If so, here is not only a very curious anomaly but also an exercise by the State magistrate of prohibited admiralty power.

Evidently the words "may summon" ought not to be construed to mean "shall summon;" for Congress has no power to make the summoning obligatory, so far at least as State magistrates, (who have no admiralty functions,) are concerned. It would seem that the imperative "shall" as it occurs in connection with the issuance of the certificate and of the process, ought to be rendered "may." What right has Congress to say that a State magistrate shall order the institution of an admiralty suit? Or that a Federal clerk shall be bound to obey such magistrate and to order the seizure of a ship to be tried in the United States District Court?

Yet the courts have held such certificates of great importance. It was held in the district of Michigan: "Such certificate must be in compliance with the statute, or else there is no foundation for the action of the clerk. It must state the residence of the judge of the district, and if that be more than three miles from the place, or he is absent from his residence at the time the proceedings are instituted before the magistrate, the proceedings are irregular. As the certificate is the only paper placed on record in this court, as the basis of proceedings here, it must show, on its face, that the State magistrate or the commissioner had power to act. Such is not the character of this certificate, and the writ is set aside, and the subsequent proceedings."¹ The "subsequent proceedings" were the issuance of the process and the seizure of the steamboat; and Judge WILKINS set these aside on the ground of informality in the certificate. In other words, an admiralty seizure was made to depend for its validity upon the certificate; the seamen were denied their suit to enforce their admiralty lien by suit *in rem*, because the certificate did not state that the Federal judge was more than three miles out of town. It is no answer to say that their right to sue *in personam* remained, as expressly provided.² They had their admiralty lien on the steamboat, under the law, and ought to have been allowed a warrant for the seizure of the boat, without reference to such certificate.

§ 493. **Application to State Magistrate not Obligatory.** Though there are other decisions which give like importance to the certificate, it may be suggested that the true construction of this legislation concerning the preliminary inquiry before the State magistrate or commissioner, is that the seamen claiming wages due may, at their pleasure, apply to such officer for a rule on the master to show cause; that such officer may act or not, as he may please; that the master may respond to the summons or not; that the examining officer may send his certified opinion to the clerk, but that he is under no legal obligation to do so; that the clerk need not regard the certificate,

¹ Steamboat London, 1 Newberry,
6; Kief v. The London, 6 McLean,
184.

² Rev. Stat. § 4547; Act 1790, 1 Stat.
at L. 133.

since the seizure would be as good without it. What then is the object of the law? It may serve to facilitate an amicable adjustment between master and seamen, and may prevent unnecessary legislation, when both parties voluntarily submit to the rule.

Seamen are treated here as wards of the law, as in other legal provisions; but it must not be overlooked that they have the rights of men, and may assert them in courts with as little hinderance as any other persons. It is doubtless an excellent, and wholly unobjectionable provision, which requires the rule *nisi* to precede process for seizure, but it is obligatory only in the Federal court, in our opinion. Masters and seamen are prone to dispute; and there is always danger that the latter will unnecessarily follow bad advice and make improvident seizures. It is in mercy to them, as well as in behalf of commerce, that the preliminary proceedings are authorized; and that permission is given to the parties and to the State magistrates to make the initiatory investigation in the absence of the Federal judge.

The practice of making a formal trial of the preliminary rule before a justice of the peace, or other State magistrate, or a United States commissioner, has been carried to an extent subversive of the spirit of the law. It has been the usage in some districts for the seamen to engage a proctor and to file a libel before the justice to obtain the certificate. This implies the right of the master to appear by attorney and file an answer; and the poor sailor is hindered rather than facilitated in the prosecution of his rights. He is really subjected to a double trial. But if the commissioner or State magistrate must try the preliminary rule, it may be that such pleading will facilitate the inquiry.

§ 494. **Certificate not Required in Suits In Personam for Wages.** The preliminary rule and certificate are not required in suits *in personam* for wages of seamen, as plainly enough appears by the last sentence of section 4547 of the Revised Statutes.¹ Judge BETTS so understood the statute,² though Mr. Dunlap thought to the contrary.³ Mr. Conkling sides

¹ Act 1790, 1 Stat. at L. p. 133.

² Dunlap's Admiralty Practice, 100.

³ Bett's Admiralty Practice, 66.

with the former, but thinks the regulation "wise and just," and intimates that it might be advantageously extended by the legislative power to actions *in personam*.¹ He doubts whether the courts may require the preliminary rule antecedent to the institution of the personal action, in the absence of express statute authorization, since the personal action has the authority of the general maritime law independently of the statute; but he never seems to doubt the binding character of the requirement with reference to State magistrates. That the shipping articles constitute maritime contracts, governable by maritime law, has been distinctly held,² and seems beyond dispute. By that law, seamen have a lien upon the freight for their wages, as well as upon the ship, and the statute does not divest them of it.³

The word "dispute," in the statute, has no reference to any quarrel the sailors may get up with the master, but must be understood, in order to make sense with the section which contains it, to be a dispute of the indebtedness on the part of the master; and, with this evident meaning, there ought to be no difficulty in seeing that the legislator meant that the right to sue could be exercised in case of such dispute, before the expiration of ten days.

It has been doubted whether the seaman is obliged to take the preliminary rule before seizing the vessel, when she is about to sail within the ten days. Certainly not, in case of necessity. And, in all other cases, the doubt may as well be decided against the anomalous procedure before a justice or other State magistrate, if the Federal judge be absent and there be no United States commissioner.

§ 495. **Rule Advisory.** Before leaving this topic, it should be remarked that the provision requiring the action before State magistrates is rather advisory than obligatory. Seamen cannot be rightly cut off from their right to enforce their lien for wages because some justice of the peace should refuse to act,

¹ Conkling's Admiralty Practice, vol. ii. p. 58.

² The James and Catharine, Bald. R. 544.

³ Poland v. The Freight and Cargo of the Brig Spartan, Ware R. 134.

since there are no legal means of making him act. He has no judicial authority in the premises and Congress can confer none upon him. On the other hand, if seamen and their late captain choose to appear before him, and he chooses to issue a certificate, and the clerk chooses to issue process thereon, the seizure to follow is not thereby affected with illegality.

If it should be answered to our criticism of the statute respecting the admiralty power conferred upon State magistrates, that it is not really a bestowal of judicial authority but only ministerial, we say that if the refusal of the magistrate to give a certificate to the clerk of the United States District Court is final, his decision is judicial. In the case which we cited from Newberry's admiralty reports, (*Kief & Lang v. The Steamboat London*, p. 6,) the district judge said, "The statute clothes the [State] judge or justice with power in the premises, and this court will not look beyond the certificate as conferring authority on its clerk to issue the process. But although the court will not look *beyond*, it will look *at* the certificate, in order to ascertain whether the exigency specified in the statute existed; or, in other words, whether there was statutory authority for the process." If the State magistrate is to decide whether or not to give authority for the seizure, and if his decision is binding upon the Federal court so as to preclude judicial inquiry concerning it, then a State magistrate may decide against giving a certificate to the seamen, which would be equivalent to a final decision of the case against them. If this is a correct exposition of the statute, the State magistrate has judicial admiralty power thereunder; and the provision of the statute granting such power is clearly violative of sec. 1, art. ii, of the Constitution. It seems that the provision cannot be preserved except under the interpretation that it is merely advisory, and not binding upon the Federal court.

§ 496. **Consolidation of Seamen's Suits for Wages.** There is another peculiar provision of the statute. All seamen of a ship are required to appear as co-libellants in one suit, though the contract of each is distinct from those of the others. The language of the law is, "In such suit," that is, the suit *in rem*, "all the seamen having cause of complaint of the like kind

against the same vessel, shall be joined as complainants.”¹ Perhaps the objects are to save costs, time and labor, and to make the proceeding simple for the seamen. As Congress has power to give this remedy for a debt secured by lien, Congress, doubtless, may prescribe the conditions of its exercise. But it would be going beyond the meaning of the legislator, evidently, were we to hold that one or two of a crew could prevent a suit *in rem* by the majority, because of the minority’s refusal to join in it. The words are, “shall be joined;” that is, if separate actions should be instituted, all the complainants having cause of like kind, such actions “shall be joined” by order of the court; shall be cumulated or consolidated. The right of Congress to direct this is indisputable, while the right to prohibit half the crew from suing because the other half will not join, is not maintainable.

Judge STORY remarked, of this provision, that it “converts what by the admiralty law is a privilege, into a positive obligation, where the seamen commence a suit at the same time in the same court, by a proceeding *in rem* for wages.”² But he held that in case of appeal, each sailor’s claim must be considered separately, in determining its appealability as to the amount involved, and for other purposes.

Now, this “positive enactment” of what was previously an *admiralty privilege*, says nothing whatever of “the same time” and “the same court.” What is to prevent the defeat of the beneficent spirit of this statute provision, by one seaman’s suing to-day and another to-morrow, under the construction of Judge STORY? The right of each sailor to bring a separate action, by his own selected proctor, ought not to be positively prohibited, since there is no priority between the several members of a ship’s crew; and we do not understand that there is any positive enactment to that effect; and, if there is, we do not understand that the seamen are bound to regard it. But we do understand that there is a “positive enactment,” binding upon the judge, to consolidate the suits, if brought separately,

¹ Rev. Stat., § 4547; Act 1790; 1 S. at L., p. 133.

² *Oliver v. Alexander*, 6 Pet. 143.

provided they are alike and against the same vessel, and a motion to consolidate them is made.

What right has the clerk of a United States District Court to refuse to file the libel and complaint of A. B. and C., because several of their comrades decline to join in a suit for wages?

§ 497. **No Compulsion to Join in Suit.** By what rule of law or reason can a sailor be made, against his will, to join in a suit as complainant, or forbidden to sue because some one else chooses not to sue? Yet, in the case of *Oliver v. Alexander*, above cited, it is held to be of imperative obligation, not that the court must cumulate like suits, but that all sailors of a given ship who sue, must sue together, though the action is not joint but several. And it has been held that in suits *in personam* for seamen's wages, the uniting of such actions is imperative.¹ Would the authors of these opinions go so far as to say that a clerk could legally refuse to file the libel of sailors A., B. and C., because their fellows C., D. and E. refused to join? Or, if both triplets appeared at once, either party with a libel, could he legally refuse to file the libels on no other ground than that they were separate? Or, could the court dismiss a complaint because all the crew had not joined?

But it has been judicially said: "This clause, if not imperative upon all the seamen to join in a prosecution already begun by a shipmate for the wages of a common voyage, at least removes all occasion for separate actions, and all equity to costs, where such separate actions are instituted."²

If it should be answered to the criticism of the statute requiring seamen to unite in one action, that the suit *in rem* is a remedy given by Congress, and that such remedy may be given with conditions; that the joining of all complainants in one libel is a condition of the exercise of the remedy, and that each seaman has his action *in personam* if he does not choose to avail himself of the other remedy coupled with this condition, it may be rejoined that conditions juridically impossible must be considered as unwritten; and that he, with wages due and

¹ *Collins v. Hathaway*, Olcott, 176.

² *Reed v. Hussey*, 1 Bl. & How. 527.

payable and with a lien on the ship whereon he earned them, has no possible means of making his co-creditors join with him in a common libel of complaint. Each may want his complaint expressed in different language from that of any one of the other complaints, though the claims are all alike; and there is a latitude of expression which cannot be contracted by law, provided rules of pleading be not violated. Men differ in view as to their rights, and as to their methods of declaring them. Since a seaman has no means of making his messmates join him, he cannot be made to join them against his will: must he therefore be cut off from his right of action?

§ 498. **Statute Requiring Consolidation Liberally Construed.**

The law gives the right of action *in rem* in undoubtedly plain terms; and the requirement that litigant seamen must all join in one action, though each claim is independent, must be deemed advisory merely, in order to save it at all, so far as concerns the institution of the suit. And so far as regards the consolidation by the court of several similar suits, the provision is obligatory upon the court only when the suits are really similar, so that they can be tried together without injury to any party's interest. The court may order the consolidation without motion, but he is not obliged to examine the clerk's files to see whether all the crew have joined in one action. When the cases are similar, and the court is moved by one of the parties to consolidate them, so far as to make one hearing answer for all, he is bound to grant the motion; and we think the statute is imperative to this effect. The similarity must be such as would, in ordinary actions at law, between a plaintiff and defendant, warrant the court in trying them together. The difference is that in these admiralty cases for wages, cases of several plaintiffs may be so tried.

The terms *consolidation* and *cumulation* have been used in a limited sense, throughout this chapter: the meaning being confined to the trial of the causes—not extending to the merging of interests.

In addition to the right to sue for wages *in rem*, the representatives of a seaman who has died upon a voyage, have a like action for his effects, or, to a sum treble their value, or to a

sum not exceeding two hundred dollars, if the master has failed to make the proper entries with regard to such seaman and his property, or neglected to take care of the latter.¹

§ 499. **Pleading.** The libel of complaint for wages, is simple. There are no special peculiarities, except that while each member of a crew has his separate action, yet all may join together, as they could not in a suit at common law when the interest of each is distinct from those of the others. The libellant should state his contract or the "facts of the hiring," the voyage, etc., and it is preferable that such allegations be in distinct articles.² He must either allege a performance of his contract, or that he was prevented by some cause which legally excuses performance.³

The allegation of a contract evidenced by the signing of the shipping articles, or of any contract whatever, is not indispensable. The suit may be upon *quantum meruit*. The rendition of the service, and the value of it, being properly alleged, would be sufficient to maintain the action. It has been held that the right of seamen to wages is not founded on the articles, but on the service.⁴ Nor does it depend upon their nationality.⁵

No security for costs is required of seamen in suits for wages;⁶ though, where they had sued for compensation because the voyage for which they had been engaged, was broken up, it was held that the rule exempting them from costs, did not apply.⁷ Nor when the shipping commissioner made affidavit that the wages had been paid.⁸

It should be alleged that the wages are due and payable. Although the law gives the lien, when the allegations bring the case within its provisions, yet the existence of the lien should be alleged; and the thing seized, (whether ship or freight,) should be charged as the debtor. The courts will liberally con-

¹ U. S. Rev. Stat., § 4540. For further upon seamen's lien for other claims than wages, see Abbott on Shipping, pp. 276-7-8.

² Orne v. Townsend, 4 Mason, 541.

³ Wilcocks v. Palmer, 3 Wash. C. C. 248.

⁴ Mahoon v. Brig Gloucester, Bee, 395.

⁵ The Pawashick, 2 Low. 142.

⁶ The Arctic, 1 Brown Adm. 347; Collins v. Hathaway, Olcott Adm. 176.

⁷ The Caroline, 2 Ben. 105.

⁸ The Niveto, 7 Ben. 69.

strue a seaman's libel, but it should be so drawn as to state the complaint unmistakably.

The defense is usually a denial of the service; or a plea of payment; or the answer that the wages have been forfeited by revolt, habitual drunkenness, persistent disobedience or other cause recognized by the admiralty law or by statute. It has been decided that loss or damage, accruing to the master or owner by any crime or negligence of a seaman, may be pleaded as a set-off against his wages.¹ But such loss must be an immediate result.² The law favors the sailor: even a receipt in full for wages has been held not conclusive against him.³ But, as a matter of course, it is usually conclusive.⁴

To plead and prove persistent mutinous conduct,⁵ assault upon the captain,⁶ habitual drunkenness, etc., would be a good defense. So would desertion,⁷ in time of danger or distress; perhaps at any time.

But the defense would not suffice, if it rested upon allegation of slight faults, occasional drunkenness or disobedience;⁸ or on desertion, when there was good cause for deserting.⁹

§ 500. **Evidence.** The master, owner, or whosoever may be defending the indebted thing, must be able to substantiate the facts upon which he relies for defense, such as desertion, drunkenness, etc., by reference to the log book. This evidence is indispensable, though he is not confined to it.¹⁰

When the master's testimony to a fact was contrary to that

¹ *Thorn v. White*, 1 Pet. Ad. 168; *The John Martin*, 1 Brown Adm. 149; *The Magnet*, Id. 547.

² *Macomber v. Thompson*, 1 Sumner, 384.

³ *Jackson v. White*, 1 Pet. Ad. 179; *Savin v. The Juno*, 1 Woods' Rep. 300.

⁴ *Phillips v. Scattergood*, Gilpin, 1; *Whiteman v. Ship Neptune*, 1 Pet. Ad. 180; *Harden v. Gordon*, 2 Mason, 541.

⁵ *Rolf v. Ship Maria*, 1 Pet. Ad. 186.

⁶ *Buck v. Lane*, 12 S. & R. 266.

⁷ *The Woodrop Sims*, 2 Pet. Ad. 393.

⁸ *Drysdale v. Sch. Ranger*, Bee, 148; *The Balize*, 1 Brown Adm. 424.

⁹ *Bush v. Alonzo*, 2 Cliff. 548.

¹⁰ *Magee v. Moss*, Gilpin, 219; *Wood v. Nimrod*, Id. 83; *Snell v. The Independence*, Id. 140; *Cloutman v. Tunison*, 1 Sumner, 373; *Brig Betsey v. Duncan*, 2 Wash. C. C. 272; *Sch. Phebe v. Dignam*, 1 Wash. C. C. 48; *Knagg v. Goldsmith*, Gilpin, 207; *Malone v. Bell*, 1 Pet. Ad. 139; *Jones v. Brig Phoenix*, 1 Pet. Ad. 201; *The Catawanteak*, 2 Ben. 189.

of three seamen, and he did not call in the mate and shipping master to corroborate him when he might easily have done so, the court held that the weight of evidence was with the seamen.¹

The charges of advances to seamen are not admissible in evidence against them, until sustained by the oath of the master.² Receipts of seamen will not be regarded by courts beyond the actual consideration, fairly paid.³

The testimony of the master of a foreign vessel is inadmissible to contradict his official report to the consul of his nation, when the libel is by a seaman for his wages, and the defense desertion: the master having reported to the consul that he had discharged the seaman.⁴ A report by marine surveyors, that a ship is unseaworthy, made in consequence of the complaint of the seamen, though admissible against them, is not conclusive against them of the fact of unseaworthiness.⁵

Parol proof, offered by a ship owner appearing for the ship in an action *in rem*, is inadmissible to vary the voyage described in the shipping articles.⁶

The burden of proof was held to be on the libellant suing for wages, to show that the ship had been unladen, when that was a condition precedent to the institution of the suit, so made by previous contract.⁷

§ 501. **The Master's Lien on the Freight for Wages.** It has been held that the master has no action *in rem* against the vessel he commands, for his wages, because his contract is with the owners.⁸ But he has a lien upon the freight for money advanced for the use of the voyage;⁹ and as the lien is a maritime one, he has the right to proceed *in rem* to enforce it. Judge WARE, in the case of *The Spartan*, (last cited,) says, (p. 137,) "That the master has a lien on the cargo for his freight, is a familiar principle of maritime law." So he has

¹ *The Dolphin*, 6 Ben. 402.

² *The David Pratt*, Ware, 496.

³ *Mary Paulina*, 1 Sprague, 45; *Rajah*, Id. 199; *Jackson v. White*, 1 Pet. Adm. 179.

⁴ *The Infanta*, 1 Abb. Adm. 402.

⁵ *Buckner v. Klorkgeter*, 1 Abb. Adm. 402.

⁶ *The Triton*, Blatch. & H. 282.

⁷ *Granon v. Hartshorne*, Id. 454.

⁸ *Steamboat Orleans v. Phœbus*, 11 Pet. 175; *Willard v. Dorris*, 3 Mason, 91.

⁹ *The Packet*, 3 Mason, 255, 334; *Poland v. The Spartan*, Ware, 134.

the remedy *in rem*, in behalf of his employer, against the cargo to recover the freight; and like remedy, in his own behalf, against the freight to recover his advances. And Judge WARE, in *The Spartan* case, thought that the master, by general maritime law, has a lien on the freight for his wages also; a position which he enforced with much strength. And Judge STORY, in *The Packet*, (above cited,) rather inclined to the opinion that, for advances, the master's lien covers the ship as well as her freight; and we think that where they were for the benefit of the ship, there can be no rational doubt about it, under the general maritime code.¹

¹ For further on the master's lien upon freight for his wages, see *The Phœbus*, 11 Pet. 184; *The Havana*, 1 Sprague, 402; *The Island City*, 1

Low. 378; *The Pawishic*, 2 Low. 142; 2 Parsons on Shipping and Admr. 25, n. 2.

CHAPTER XLVI.

PILOTAGE, WHARFAGE, TOWAGE, ETC.

Pilotage Under Admiralty Jurisdiction	502	Wharfage and Wharfingers.....	504
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§ 502. **Pilotage Under Admiralty Jurisdiction.** Pilots may enforce their claims *in rem*, for their services. They have the alternate remedy *in personam*, with which we have nothing to do. They are authorized, by the fourteenth admiralty rule, to adopt a third course: sue by a mixed action “against the ship *and* master;” but, as such anomalous actions are authorized by several other of those rules in the enforcement of other admiralty liens, they will not be discussed now as a separate topic. Here we consider actions *in rem* to enforce *liens* on vessels for pilotage.

Admiralty jurisdiction of pilots’ liens is universally conceded.¹ In England, this jurisdiction is beyond dispute.² In this country, the subject of pilotage is understood to be embraced in the constitutional warrant to regulate commerce, given to Congress. But this has been questioned.³ The existing statutes on the subject seem to require no special elucidation.⁴

§ 503. **Concurrent State Jurisdiction.** It has been held that State courts have concurrent jurisdiction,⁵ notwithstanding that pilotage is a strictly maritime service, and within the pur-

¹ Ex parte McNeil, 13 Wall. 236; The Alaska, 3 Ben. 391.

² The Bee, 3 Dodson, 498; The Nelson, 6 Rob. 227; The B. Franklin, Id. 350.

³ The Wave, 2 Paine, C. C. 131.

⁴ United States Rev. Stat., arts. 4235-4238, 4401, 4406, 4407, 4413, 4442

-4446, 4693, 4695, 5344.

⁵ Hobart v. Drohan, 10 Pet. 108; The Anne, 1 Mason, 508; Dexter v. Bark Richmond, 4 Law Rep. 20; Smith v. Swift, 8 Met. 332. See The Orleans v. Phœbus, 11 Pet. 175; Dougan v. Champlain Trans. Co., 56 N. Y. 1.

view of admiralty jurisdiction.¹ Under the first statute of Congress on this subject, the previously existing State laws were declared operative upon pilotage; but C. J. MARSHALL held, as the organ of the Supreme Court, that Congress cannot enable a State to legislate on the subject.² The doctrine that the United States have concurrent jurisdiction with the several States, over pilotage, was definitely announced by that court, at a much later date. Indeed, the court went so far as to say, through Mr. Justice CURTIS, that the "regulation" of pilots and pilotage had been left to the several States, though the concurrent jurisdiction over actions on pilotage liens seems to have been maintained. We extract from the opinion: "It is the opinion of the majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of the power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States."³ We decidedly incline to join Mr. Justice WAYNE, in his dissent in this case.

Congress has undertaken to delegate legislative power over pilots, till such time as they choose to take up the subject. It has provided as follows: "*Until further provision is made by Congress*, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose." (?)⁴ But no discrimination shall be made by the States in the rates of pilotage, Congress directs.⁵

By the act of Feb. 28, 1871, however, Congress regulated pilot's licenses, etc., so far as steam vessels are concerned,⁶ but still reserved State legislation in part, and still assumed to direct it in some particulars.

¹ The T. Jefferson, 10 Wheat. 428; Peyroux v. Howard, 7 Pet. 324.

² Gibbons v. Ogden, 9 Wh. 1, 218.

³ Cooley v. Board of Wardens, 12 Howard, 299. See The Alice Tainter, 5 Ben. 391.

United States Rev. Stat. § 4235; Ex Parte McNeil, 13 Wall. 236; Gibbons v. Ogden, 9 Wheat. 207; License Cases, 5 How. 580.

⁵ § 4237 Rev. Stat. U. S.

⁶ Id. §§ 4442, 4443, 4444.

In the twelfth of Otto, the Supreme Court confirmed the above cited cases of Gibbons, Conley and McNiel, and treated the subject of concurrent State jurisdiction concerning pilotage as settled; also, they held that a pilot may recover pilotage, under the laws of New York, for services tendered, (though refused,) beyond that State's bounds.¹

The fourteenth admiralty rule is: "In all suits for pilotage, the libellant may proceed against the ship and master, or *against the ship*, or against the owner alone or the master alone *in personam*." Thus, there may be a mixed action; there may be an action *in rem*; or there may be a personal action either against the owner or the master.

It has been held that the contract of pilotage must be made with the captain or with some other person authorized by the owner, in order that it may create a lien upon the ship.²

§ 504. **Wharfage and Wharfingers.** For dockage or wharfage, it has been decided that there is a lien upon the ship which may be enforced *in rem*; Judge STORY holding that the Federal jurisdiction, in such case, is fully supported in principle by the doctrines of both the civil and the common law, and by reasoning from the analogous practice with regard to materials furnished and repairs made.³ Indeed, he ranks the lien for wharfage as higher among privileges than that evidenced by the bottomry bond. He did not, however, award the intervenor upon wharfage, in the particular case, such rank as to precede the bottomry libellants of the ship Jerusalem; but his denial of it was expressly because the wharfinger had made a special contract with the owners of the ship; otherwise, he would have been assigned the superior rank. But Mr. Justice STORY makes his meaning doubtful, when, after having said that the jurisdiction *in rem* was fully supported by the civil law and by "analogous cases of materials furnished and repairs made upon the ship," he adds that if the wharfinger "had parted with his possession the case would have been entirely altered;" that is to

¹ Wilson v. McNamee, (12 Otto,) 102 U. S. 572; Swayne, J.

² The Anne, 1 Mason, 508.

³ Ex parte Lewis, 2 Gal. 483; Ex

parte Easton, 95 U. S. (5 Otto,) 68; The Kate Tremaine, 5 Ben. 60; The

A. McNeil, 20 Int. Rev. Rec. 175;

Brookman v. Hamill, 43 N. Y. 554.

say, he would have lost his lien. This conclusively shows that his mind was upon a common-law lien—not upon one of the civil or maritime law.

And Judge PETERS gives as a reason why he was accustomed to allow wharfingers to be paid out of the proceeds of a vessel libelled and condemned, that they "might detain the ship until payment," which hints that he thought possession essential to the lien.¹ His practice seems to have been followed in his district.² But Judge WARE, in deciding upon interventions in the case of *The Phebe*,³ said, "I admit the law that the owner of a wharf has generally a lien on a vessel for the wharfage, but I do not admit that he has, in a case of this kind, such a lien as authorizes him to detain the vessel for his pay. The right of detention is founded on possession, and necessarily supposes that the person having such right has the possession, or at least, the *quasi* possession of the thing. 1 STORY Eq., p. 483, n. 506. But in this case, after the vessel was arrested on process from the court, she was in the custody of the law," etc. * * * The "lien for wharfage, admitting it to exist, was not one which could be enforced by the detention of the vessel:" *i. e.*, not a common law lien.⁴

A municipal corporation may be a wharfinger, within the meaning of the maritime law.⁵ But a State law or city ordinance, establishing rates of wharfage, must not discriminate in favor of citizens of the State or city.⁶ But rates may be made proportionate to tonnage.⁷

It has been held that *an admiralty lien* for wharfage and dockage, at the home port, may be created, and may be enforced

¹ The Ship New Jersey, 1 Pet. Admiralty R. 223.

² The Schooner McDonough, Gilpin, 101.

³ The Phebe—Perkins, Claimant, 1 Ware, 360.

⁴ See *Ives v. The Buckeye State*, 1 Newberry, 69; *The Asa R. Swift*, Id. 553.

⁵ *Packet Company v. Kekuk*, (5 Otto,) 95 U. S. 80; *Packet Co. v. St. Louis*, (10 Otto,) 100 U. S. 423; *Vicks-*

burg v. Tobin, Id. 430. See *Union Wharf Co. v. Hemingway*, 12 Ct. 293; *The J. H. Stavins*, 15 Blatchf. 473; *New Orleans v. Wilmot*, 31 La. An. 65; *Bacon v. Mulford*, 41 N. J. L. 59; *Walsh v. N. Y. Dock Co.*, 77 N. Y. 448; Id., 8 Daly, 387.

⁶ *Guy v. Baltimore*, (10 Otto,) 100 U. S. 434.

⁷ *Eilerman v. McMains*, 30 La. An. Part i., 190.

against the ship or steamboat.¹ A steamboat owned by the city of New York, and employed in transporting the harbor police, was held devoted to a specific public use, and could not be seized for wharfage.²

When State law gives a lien on a vessel for wharfage, it may be enforced *in rem* in a court of admiralty.³

It has been held that both pilotage and towage stand in the same rank of maritime liens as necessary repairs and supplies.⁴

§ 505. **Towage, Etc.** Parsons says that wharfage is usually assessed as average and paid by contribution, along with towage, light money, hire of anchors, cables, boats, etc., quarantine expenses, cutting through ice, etc.; but he adds, "In regard to many of them there is probably no established usage or rule of law."⁵

The towage lien is not waived by taking a note for the debt.⁶

Owners of tugs or towboats are not liable as common carriers, but are responsible for want of skill and due diligence.⁷ The skill and diligence required of those who conduct tug steamers, are in accord with the peculiar character and employment of such vessels; and, in case of collision, peculiar rules apply to them, and the courts take into consideration the burden borne by a tug when towing. But, should damage be done by reason of overburdening herself, the tug would not be deemed entitled to favor, but her tort would be the more aggravated.⁸

¹ The St. Jago de Cuba, 9 Wheat. 418; The Kate Tremaine, 5 Benedict, 65; The De Soto, (or Waring v. Clark,) 5 Howard, 441. See Breed v. Lynn, 126 Mass. 367; Nickerson v. Tirrell, 127 Mass. 236.

² The Seneca, 8 Benedict, 509.

³ Steamer J. H. Starin, 45 Conn. 585.

⁴ The Sea Witch, 3 Woods, 75.

⁵ Parson's Maritime Law, i., 312, where he cites Wightman v. Macadam, 2 Brev. 230; Lyon v. Alvord, 18 Conn. 66. See The Tug Champion, 7 Chicago Legal News, 1.

⁶ The Napoleon, 7 Bis. 393.

⁷ Transportation Line v. Hope, 95 U. S. (5 Otto,) 297; Arctic Fire Ins. Co. v. Austin, 69 N. Y. 470; Carpenter v. Eastern Trans. Line, 71 New York, 574.

⁸ For illustration of towing vessels and collisions in which they were concerned, see Deems v. Albany & Canal Line, 14 Blatchf. 474; The Herbert Manton, Id. 37; The Rhode Island, 8 Ben. 38; The Edmund Levy, Id. 144; The Edgar Baxter, Id. 162; The City of Norwich, Id. 206; The Swallow, Id. 223; The Herald, Id. 263; The Cement Rock, Id. 443; The Don Juan, Id. 489.

CHAPTER XLVII.

SALVAGE.

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§ 506. **The Salvor.** The libellant is the salvor. The libellee is the thing that has been saved, if the suit is *in rem*. The maritime usage is to proceed *in rem*, though personal actions for salvage are allowable. The rules of the United States Supreme Court provide for either remedy. We shall confine ourselves to the former, but shall freely cite cases from the latter class of actions when they illustrate principles belonging to our subject.

The libellant for civil salvage must be a person who has voluntarily rendered meritorious and effectual service in saving property from loss, on navigable waters or their shores, when such service was not obligatory upon him by reason of any existing relation between himself and such property. The definition of Lord STOWELL, found in his opinion in the case of the *Neptune*,¹ is too indefinite. He defines the salvor as "a person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a voluntary adventurer without any pre-existing covenant that connected him with the duty of employing himself for the preservation of the ship." He meant what we mean; but the latter part of his definition does not sufficiently distinguish between the ship officers and crew who are impliedly under covenant to preserve their ship,

¹ The *Neptune*, 1 Haggard, 227.

and those who contract to save a ship in distress. The latter may be salvors and successful libellants.

§ 507. **Military Salvage.** Libellant salvors may be divided into two general classes: *Civil* and *Naval*, since salvage is known, in the books, as civil and military. Of military salvage, and naval salvors or captors, we have sufficiently treated when discussing *prize*, *capture* and *recapture*, in our book on Things Hostile; and we shall have no occasion to deal with those topics here, except as they bear upon civil salvage. We remark, however, *en passant*, that in prize proceedings in this country, the United States are nominally the only libellants, and the moiety due the captors as prize money or military salvage is awarded without their formal appearance either as libellants or intervenors. The necessity for the captor's intervention arises only when the United States have failed to name him or his ship as the captor, and especially when some other captor has been erroneously named. There is often intervention by co-captors.

It will be observed that while the government proceeds *in rem* against the prize for its confiscation as a *Thing Hostile*, the captor's claim is against it as a *Thing Indebted*. He has a maritime lien upon it of the highest rank. His right is a *jus ad rem*, while the government's is a *jus in re*. His position is similar to that of the lien holder authorized by the statute of 1863 to intervene in confiscation proceedings *in rem* for the condemnation of *Things Hostile* seized upon land.¹ It must not be overlooked that both guilty and hostile things may have liens resting upon them, and that, in such case, they are indebted things *quoad* the lien holders. And since a decree of condemnation cuts off all non-appearsers in response to notice, the intervention of such lien holders must *ex necessitate* be permitted, if justice to them is to be done at all.

The allowance of the captor's lien to the extent of the moiety has been so universal, in the administration of prize law, that it would be done, under public law, in the absence of any provision in the prize acts; but the liens of private citizens upon

¹ U. S. Rev. Stat., § 5322.

things seized for confiscation by virtue of the statutes so ordaining, might have been thought, by the courts, to have been precluded by the government's *jus in re*, had not Congress removed all doubt by the statute above mentioned. True, in the absence of such a statute, the requirement that proceedings should be *in rem* included the usual course—notice to all persons, having interest, to assert it, etc.; but the act of 1863 removes all doubt, and gives, to the lien holder, rank above the government.

The rule that the salvor must be one who is not bound to save the property by reason of his employment, finds an exception in the case of the naval captor (or military salvor, as the term is,) for, while the capture of enemy vessels is a duty devolving upon him by reason of his employment, it is so hazardous and meritorious a work, and the performance of it inures so greatly to the benefit of the government, that he is allowed compensation as great as that in cases of the saving of vessels derelict in civil salvage. Indeed, he might almost be said to create the *res* against which the government proceeds, since, by *saving* it from the clutches of the enemy, he enables the libellant government to gain a possession which would be otherwise impossible. In this, his service resembles that of the salvor of property abandoned and derelict.

When naval vessels, officers, marines and crew, or government vessels of any sort, save property beyond their line of duty, they come under the general rule, and the salvage is strictly civil salvage. There will be occasion to refer to cases of this kind, under the appropriate head.

§ 508. **Recapture.** In the foregoing observations, no distinction has been drawn between capture and recapture; but such distinction is usually made by writers on the subject, by the courts, and by Congress in statutes upon the subject. The term *salvage* is not ordinarily employed to denote the moiety awarded to captors, though it is in current use when that awarded to recaptors is described; and when military salvage is mentioned, it usually has no reference to prize. But, since the captor's claim to prize money to the amount of one-half the proceeds of the prize is really his legal award for wresting or

saving property from the enemy whose proprietary rights are not to be regarded, his compensation is in the nature of salvage.

The recapture of any vessel or other property from a hostile force, is a salvage service, to be rewarded as such, as provided by Congress.¹ It is the duty of officers and crews of ships of war to render such service, yet they are military salvors—thus forming an exception to the general rule, as above stated. In such case, the salvors become libellants for the enforcement of their lien; and, though the distribution among officers and marines, etc., is by the prize rule of disbursement, the United States take no part. The judiciary treat recapture as salvage service, though they never speak of original capture from the enemy as such.² But it was said in the case of the *Adeline*, that salvage is an incident to the question of prize. Authors, however, have almost invariably distinguished between the terms prize and military salvage.

Salvage has been allowed to persons recapturing the vessel, to which they belonged, from an enemy.³ It is essential that the property be taken from an enemy.⁴ Where a neutral vessel was rescued from a belligerent, salvage was denied.⁵ But it was allowed when, after capture by one belligerent of another, a vessel was given to a neutral who libelled her in his own country—which country engaged in war with the first belligerent before the adjudication of the vessel,⁶ and a moiety was given to the libellant.

Salvage was allowed to a United States ship of war for recapture when the vessel regained was in danger of foreign condemnation,⁷ but the officers and crew of such a ship were denied it for bringing in a derelict vessel pursuant to general orders of the navy department.⁸

§ 509. **Civil Salvage ex Contractu.** Libellants for civil salvage may be subdivided into two classes: 1st, Those who

¹ U. S. Rev. Stat., § 4652.

² *The Blaireau*, 2 Cr. 240; *The Cora*, 2 Wash. 80; *The Schooner Adeline*, 9 Cr. 244; *The Star*, 3 Wh. 78; *Talbot v. Seeman*, 1 Cr. 1; *The Amelia*, 4 Dal. 34.

³ *The Ship Harmony*, 1 Pet. Ad. 70.

⁴ *The Ann Green*, 1 Gallis, 274.

⁵ *The Brig Antelope*, Bee, 233.

⁶ *The Adventure*, 8 Cr. 231.

⁷ *Talbot v. Seeman*, 1 Cr. 1.

⁸ *The Josephine*, 2 Blatch. 322.

sue upon a contract of salvage to save property; and, 2nd, Those who sue upon *quantum meruit*.

Congress has declared that "any stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative."¹ But there is no inhibition when the contract is in his favor, except so far as it would be void for want of reciprocity.

An agreement respecting salvage, has been held void, when made at sea, in distress.² But contracts of salvage are enforced in the courts, when made between parties under circumstances such as to create no such necessity as to require immediate relief at any expense or hazard on the one side, and on the other no obligation to lend the required assistance, and no motive to take advantage of the agency of the peril to drive an unconscionable bargain.³

The United States Court of Claims allowed compensation for the saving of a government vessel by those who acted under promise of the captain that they should be paid.⁴

Where compensation had been fixed by contract between the captain in distress and the salvors, the latter were not allowed to charge beyond the sum stipulated.⁵ But where, after such an agreement, circumstances caused the abandonment of the contract, the salvors were allowed on *quantum meruit*.⁶ But such a contract, though binding upon salvors, has been held not necessarily so upon the vessel in peril.⁷ And such contract has been thought inconsistent with salvage claims.⁸ Where the service is in pursuance of a duty required by law, it has been said that no salvage can be earned,⁹ though we think there may be circumstances that would justify the allowance of

¹ U. S. Rev. Stat. § 4535.

² The Brothers, Bee, 135; The Ship Nancy, Id. 139.

³ Bearse v. 340 Pigs of Copper, 1 Story, 314.

⁴ Gould v. The United States, Court of Claims Rep. 184.

⁵ The Henry, 2 Eng. Law and Eq; The H. B. Foster, 1 Abb. Adm. 222; Welch v. Bradbury, 16 Pick. 375.

⁶ The Samuel, 4 Eng. Law and Eq.

581; Shute v. Dodge, 7 La. Ann. R. 480.

⁷ The Patchin, 1 Blatchf. 414; The Jenny Lind, 1 Newb. 443.

⁸ The Independence, 2 Curtis (C. C.) 350; Squire v. 100 Tons of Iron, 2 Ben. 21.

⁹ The Wave, 2 Paine, 131; The Josephine, 2 Blatchf. 322; Box of Bullion, Sprague, 70.

salvage compensation to one discharging such legal duty. The crew should not be deprived of their salvage rights on account of a contract made by their captain.¹

§ 510. **Civil Salvage on Quantum Meruit.** The entire crew of a saving vessel are entitled to salvage, though all may not have been on board the wreck.² And when they have become disconnected with their own ship, they are to be considered salvors, if they save her; and this rule extends to the master and other officers.³

But while regularly employed, the saving of the ship on which they serve and of the cargo which they convey, is in the strict line of their duty, and entitles them to no extra compensation. Even where a whale ship was wrecked near a small sand-bank of an island in the Pacific ocean, and the crew secured a part of the oil from the water, at great risk and labor, they were held not entitled to salvage.⁴

"The controlling inquiry in salvage cases is, Was the property in peril of being lost, and was it saved by the efforts of those claiming to be salvors?"⁵ to which should be added, And were they legally entitled to be salvors?

Pilots assisting distressed vessels beyond the line of their duty, are entitled to compensation.⁶

While acting in his professional capacity, a pilot cannot be a salvor of the ship or cargo for which he is employed, though he may, after his service has ended.⁷ And a sailor may be a salvor after the vessel has been deserted by the rest of the crew and the officers.⁸ And where a person took the master's place,

¹ The John Taylor and Tackle, 1 Newb. 341.

² The Centurion, Ware, 477.

³ Bridge v. Niagara Co. 1 Hall, (N. Y.) R. 423; The Olive Branch, 1 Low. 286; The Antelope, Id. 130.

⁴ Holder v. Borden, 1 Sprague, 144.

⁵ The M. B. Stetson, 1 Bond, 119; The Bicknell, Id. 270; The J. F. Farlan, 8 Blatchf. 207; Bryan v. United States, 6 Ct. of Cl. 128; The Virginia, 3 Biss. 49; Rebecca Clyde, 5 Ben. 98.

⁶ The Ship Peragio, Bee, 212; The Elvira, Gilpin, 60; Le Tigre, 3 Wash. 567; Hobart v. Drogan, 10 Pet. 108; The Dido, 2 Paine, 243; The Grace Brown, 2 Hugh. 112.

⁷ Hobart v. Drogan, 10 Pet. 108; The Wave, 2 Paine, 131; but see The Dido, Id. 243, and The Alexander, Id. 466.

⁸ Mason v. Ship Blaireau, 2 Cr. 240; The Florence, 20 Eng. Law and Eq. 607; The Triumph, 1 Sprague, 428.

at the latter's request, and performed meritorious service in saving the steamboat which he temporarily commanded, he was held a salvor.¹

When masters of vessels enter into consortship for salvage service, the owners and crew share in the benefits of the agreement;² but not if one of the consorts abandon the enterprise.³ Of course, the owners of a saving ship share the salvage compensation.⁴ But a sailor who used his own boat, was not allowed more salvage than his fellow sailors, he having been paid its value.⁵

It was held that when a captor donated a prize to a neutral, the donee, having brought the vessel into the port of his own country, must be treated as a salvor.⁶

A corporation doing salvage service with its own vessel, may be a salvor.⁷

The officers and crew of a foreign war vessel may be salvors.⁸

A passenger, under some circumstances, may be a salvor,⁹ and the mere finder of derelict goods, who preserves them.¹⁰ Soldiers, being on a government vessel to be conveyed to their destination, are entitled to salvage for saving such vessel,¹¹ though passengers are not ordinarily salvors for saving the vessel on which they are voyaging.

A mere purchaser of a ship unlawfully condemned and sold, would not be a salvor by bringing her to the former owners.¹² The shipper of cargo is not entitled to salvage unless the stoppage for the purpose of saving property was authorized by him.¹³

¹ The Steamboat Pontiac, 5 McLean, 359.

² Andrews v. Wall, 3 How. 568; The Ship Canada, Bee, 90.

³ Marcy v. Chambers, 15 Annual, (La. R.) 77.

⁴ The Charles, 1 Newb. 329; The Cora, 2 Wash. 80; Waterbury v. Myrick, Blatchf. and H. 34.

⁵ Hawkins v. Avery, 32 Barb. (N. Y.) 551.

⁶ The Adventure, 8 Cr. 221.

⁷ The Comanche, 8 Wall. 476; The Blackwell, 10 Wall. 1; The Birdie,

7 Blatchf. 238; but *contra*, The Farland, 3 Ben. 206; The Stratton Audley, Id. 241; The Birdie, Id. 273.

⁸ The Huntress, 2 Wallace Jr. 59.

⁹ The Brig Cora, 2 Wash. 80; The Anastasia, 1 Ben. 166.

¹⁰ The Bee, Ware, 332; The Amethyst, Dav. 20. But see The Ida L. Howard, 1 Low. 3; The Ottawa, Id. 274.

¹¹ The Merrimack, 1 Ben. 201.

¹² The Neptune, 2 Pet. Ad. 356.

¹³ The Nat. Hooper, 3 Sumn. 543.

Salvors should not refuse necessary assistance.¹ Where a small schooner was salvor for a ship, but was assisted by a steamer in getting the ship into port, the schooner was held "first salvor," and the steamer was also entitled to award, or rather, those who had employed her for the purpose of the towing.²

Where a derelict was lost, the vessel trying to save it was not responsible, though somewhat at fault.³ But, a salvor engaged in the business of relieving vessels from fire, must have on board the usual implements: chain hawsers, etc., and may be held liable for damages caused by the want of them.⁴

Salvage is for saving property—not for saving human life.⁵ And the service has been well defined.⁶

It is, of course, essential, that the service be effectual,⁷ and rendered in proper capacity. It was held that firemen belonging to the fire department of a city, were not entitled to salvage for extinguishing a fire from a ship lying at one of the city wharves.⁸

§ 511. **Peculiarities of Pleading.** Interventions in salvage causes by ship owners for freight and general average, have been held out of place: the claim should be preferred by direct action against that portion of the proceeds adjudged to the owners of the goods.⁹ However, it would be found convenient to allow such interventions, where saved goods are the *res*; and the court might easily fix the rank of the ship owners' privilege upon such goods.

When government property has been saved, it is subject to

¹ The *Glory*, 2 Eng. Law and Eq. 551.

² The *Pickwick*, 20 Eng. Law and Eq. 628; Vide The *Harbinger*, Id. 641; The *Henry Ewbank*, 1 Sumn. 400; *Norris v. The Island City*, 1 Cliff. 219.

³ The *Laura*, 14 Wall. 336.

⁴ The *Clarita* and The *Clara*, 23 Wall. 1.

⁵ The *Emblem*, Daveis, 61.

⁶ The *Ship Versailles*, 1 Curtis C. 353; The *Brig Alphonso*, Id. 376;

Miller v. Kelly, 1 Abb. Adm. 564; The *Pontiac*, 1 Newb. Adm. 130; The *Charles*, Id. 329.

⁷ The *T. P. Leathers*, 1 Newb. 421; The *John Wurts*, Olcott, 462; The *H. B. Foster*, 1 Abb. Adm. 222; A *Raft of Spars*, 1 Abb. Adm. 291; but, see The *Sailor's Bride*, 1 Brown Ad. 68; The *Clarion*, Id. 74; The *Williams*, Id. 208.

⁸ *Dacey v. Frost*, 2 Woods, 306.

⁹ The *Sibyl*, 4 Wh. 98.

the salvor's lien, which may be enforced *in rem*, in case it can be done without taking it out of the possession of government officers.¹

It was held that a libel for salvage may be filed in the name of the master and owners of the salving vessel, though the master disclaim;² but the unauthorized use of the master's name as a libellant would seem to be wrong, though not affecting the libel's validity as to the owners.

Salvors cannot proceed *in rem* against the vessel and *in personam* against the consignees of the cargo, in the same libel.³ They cannot proceed *in personam*, if they have abandoned the goods, but they may select that action, if they have delivered them to the owners.⁴ And it has been decided that they cannot sue the master *in personam*, unless the salvage service was rendered to him.⁵

All co-salvors should be made parties to the suit.⁶ Such as are not so made, ought to have their rights preserved by the court, so far as the evidence establishes those rights.⁷

There are cases in which salvors have been held to common law remedies, contrary to the spirit of the maritime law, and to the more liberal practice now prevailing.⁸

§ 512. **Grounds of Defending the Res.** Perhaps it can best be shown what are proper defenses to actions for salvage, by reference to what has heretofore been decided, since the cases present some variety of circumstances and principles which will thus be better impressed upon the reader than they could be by disquisition upon defensive pleading in salvage suits.

One good defense is, that the property was not really saved, however heroic, laborious and perilous the efforts to save it.⁹ On the other hand, it should be remembered, it will not serve the respondent to plead, where there was an actual saving, that

¹ The Davis, 10 Wall. 15.

² The Blackwell, 10 Wall. 1.

³ The Sabine, (11 Otto,) 101 U. S. 384.

⁴ The Emblem, Daveis, R. 61.

⁵ Miller v. Kelley, 1 Abb. Adm. 564.

⁶ The Edward Howard, 1 Newb. 522.

⁷ The T. P. Leathers, Id. 421.

⁸ Baker v. Hoag, 7 Barb. (Sup. Ct. R.) 113; Sturgis v. Law, 3 Sandf. (Sup. Ct. R.) 451; Collard v. Eddy, 17 Missonri, 354; Palmer v. Rouse, 3 Hurl. & Nor. 505.

⁹ Brig Dodge Healy, 4 Wash. C. C. 651.

the salvor's service was not meritorious since it did not result from a desire to save the property or to benefit the owner.¹

A good defense, and one frequently employed, is that there has been fraud, concealment, theft, spoliation or gross neglect on the part of the salvors.

The master loses all his salvage because of his embezzling a part of the goods saved.² If other salvors collude with the master to defraud the owners, their claim is forfeited.³

Though salvage is not lost because of honest ignorance, causing damage to the rescued property in saving or bringing it in,⁴ yet it is forfeited by smuggling or embezzling, spoliation or gross neglect, forcible resistance to authority, etc.⁵ But the sailors are not to lose their right by reason of the bad conduct of the captain.⁶ And the crew cannot be denied compensation for salvage service because of bad conduct previous to its rendition, in matters not connected with that service.⁷ Nor for embezzlement of goods, in an action by the crew against the owner of the vessel, if the owner of the goods has paid to him the entire salvage claim, without any deduction for embezzlement.⁸

It is a good defense against a libel for military salvage, that the recapture was that of neutral property, by a neutral, from a friendly power.⁹ And the fact that the rescued property has been condemned in a court of nations is a good defense.¹⁰ Where government vessels claim salvage, the statutes limiting their rights in the premises may sometimes be successfully pleaded.¹¹

§ 513. **The Adjudication and Amount of Award.** Congress has regulated the subject of adjudication, in cases of salvage for recapture.¹²

¹ *Le Tigre*, 3 Wash. C. C. 567.

² *Mason v. Ship Blaireau*, 2 Cr. 240.

³ *Cargo of the Schr. North Carolina*, 15 Pet. 40.

⁴ *The Rosalie*, 25 Eng. Law. and Eq. 605.

⁵ *The Bello Corrunes*, 6 Wheat. 152; *A Quantity of Iron*, 2 Sprague, 51; *The Island City*, 1 Black, 121; *The Rising Sun*, Ware, 378; *The Leander*, 1 Bee, 260; *The Barefoot*, 1 Eng.

Law and Eq. 661; *The Boston*, 1 Sumn. 328; *McGregor v. Ball*, 4 La. An. 289; *Harley v. Gawley*, 2 Sawyer, 7.

⁶ *The Missouri's Cargo*, 1 Sprague, 428.

⁷ *The Centurion*, Ware, 477.

⁸ *Blake v. Patten*, 3 Shep. 173.

⁹ *Peck v. Randall*, 1 Johns. 165.

¹⁰ *The Star*, 3 Wheat. 78.

¹¹ *Id.*

¹² Rev. Stat. U. S. § 4652; 2 Stat. at L. 14; *Talbot v. Seeman*, 1 Cr. 1.

Under the act of March 3, 1801, one-sixth of the cargo of vessels recaptured was awarded to the salvors, though a different rule was observed with regard to French property, as a matter of amity and reciprocity.¹ Neutral property now is generally restored without salvage. In many ordinary cases there are no means of fixing the amount due for salvage service by any inflexible rule. And where the amount is within the sound discretion of the court, appeals from the award will not be encouraged.² The amount proper to be allowed, depends, of course, upon the nature of the service. While one-sixth was awarded as salvage in case of a recapture,³ one-half is frequently allowed for saving a derelict vessel.⁴

But the award for saving derelict property, though usually very liberal, varies with the value of the service, considering the risk, labor, etc.;⁵ indeed, whether derelict or not, such variation of allowance prevails for such causes.⁶

¹ Schooner *Adeline* and Cargo, 9 Cr. 244.

² *The Sibyl*, 4 Wheat. 98; *Hobart v. Drogan*, 10 Pet. 108.

³ *Talbot v. Seeman*, 1 Cr. 1.

⁴ *The Henry Ewbank*, 1 Sumn. 400; *Barrels of Flour*, 2 Story, 195; *L'Esperence*, 1 Dods. 46; *The Francis Mary*, 2 Hagg. 89; *The Reliance*, Id. 90; *The Eugene*, 3 Hagg. 156; *The Effort*, Id. 153; *The Zwei Gebroder*, Id. 430; *The Britannia*, Id. 153; *The Waterloo*, 1 Black, and H. 128; *Cargo of Ship Favorite*, 4 Cr. 347.

⁵ *The Barque Island City*, 1 Black, 121; *Smith v. The Stewart*, *Crabbe*, 218.

⁶ *The John Gilpin*, *Olcott*, 77; *The John Wurts*, Id. 462; *The Pontiac*, 1 Newb. 130; *The Charles*, Id. 329; *The John Taylor and Tackle*, Id. 341; *The Delphos*, Id. 412; *The T. P. Leathers*, Id. 421; *The S. W. Downs*, Id. 458; *The Storm*, 1 Newb. 458; *Post v. Jones*, 19 How. 150; *Box of Bullion*, *Sprague*, 91; *Barrels of Oil*, Id. 91; *The Maria Bishop*,

Blatchf. Prize Cases, 552; *The John Clayton*, 4 Blatchf. C. C. 372; *The Czarina*, 2 Sprague, 28; *The Anna*, 10 Blatchf. 456; *The Bowen*, 5 Ben. 296; *Harley v. 467 Bars R. R. Iron*, 1 Sawyer, 1; *The John Perkins*, *Ware*, 87; *The Minnie Miller*, 6 Ben. 117; *The Speedwell*, Id. 96; *The Acorn*, Id. 98; *The Rebecca Clyde*, 5 Ben. 98; *The Wexford*, 6 Ben. 117; *The Anna*, Id. 166; *The Boliver v. The Chalmette*, 1 Woods, 397; *The Senator*, 1 Brown's Ad. 372; *The Michael Groh*, Id. 419; *The C. W. Ring*, 2 Hugh, 99; *The Grace Brown*, Id. 112; *The Wm. Penn*, Id. 144; *Ten Bales of Gunny Bags*, 3 Sawyer, 187; *Tyson v. Prior*, 1 Gallis, 133; *The Brig Cora*, 2 Wash. C. C. 80; *The Bellona*, *Bee*, 178; *British Consul v. Smith*, Id. 178; *The Boston*, 1 Sumn. 328; *The Sloop Ann*, 2 Pet. Ad. 278; *The Priscilla*, *Bee*, 1; *The Jefferson and Cargo*, 1 Pet. Ad. 45, note; *The Ship Cato*, Id. 48; *Goods saved from LaBelle Creole*, Id. 31; *Peisch v. Ware*, 4 Cr. 347; *The Ship Blaireau*, 2 Id. 239;

§ 514. **The Distribution.** Congress has fixed the manner of distribution, as to vessels of the navy: "All ransom money, salvage, bounty, or proceeds of condemned property, accruing or awarded to any vessel of the navy, shall be distributed and paid to the officers and men entitled thereto in the same manner as prize money, under the direction of the Secretary of the Navy."¹

In ordinary cases of civil salvage, the owner of the ship rendering the service has sometimes been allowed one-third of the whole salvage compensation;² but there is no fixed rule on the subject, though Judge STORY, in the case cited, thought one-third should be the general rule. All the facts must be considered.³

The master is usually allowed twice as much as the mate, unless the services of the latter have been extraordinary. One-fourth the residue, (after fixing the salvage ship's one-third, more or less,) is about the common allotment to the master; one-eighth to the mate, and the balance of the salvage money to the crew. This distribution is in cases where there are no other salvors to be satisfied. Discrimination is made between the different sailors, according to the respective merits of their services, when justice requires it; but invidious distinctions are not made on slight grounds.⁴

When there are other salvors besides the officers and crew and their ship, such as finders, freighters, passengers, assistants from other ships and crews, who, under the evidence in a particular case, may be entitled to share in the compensation, (though passengers and freighters are not usually entitled,) the court must dispose of the award among them judiciously accord-

The Messenger, 2 Pet. Ad. 284; Bass v. Five Negroes, Bee, 201; Jerby v. 194 Slaves, Id. 226; The Friendship, Id. 175; The Elvira, Gilpin, 60; The Elizabeth and Jane, Ware, 35; 140 Barrels Flour, 2 Story, 195; 340 Pigs of Copper, 1 Id. 314; The Geo. W. Wright, 8 Ben. 219; The Ontario. Id. 500; The Tros, 10 Phila. 223.

¹ U. S. Rev. Stat. § 4642. See § 3689.

² The Blaireau, 2 Cr. 240.

³ Sonderburg v. Ocean Towboat Co. 3 Woods, 146; The Cochrane, Id. 304; The Colima, 5 Saw. 181; Morgan v. United States, 14 Ct. Cl. 442.

⁴ The Henry Ewbank, 1 Sumn. 400; The Cora, 2 Wash. 80; The Jonge Bastian, 5 Rob. 322.

ing to merit, since it is impossible to lay down any inflexible rule. Of course, where such sharers of the salvage come in, the amount that would otherwise have been apportioned to the salvors first mentioned, must be correspondingly reduced, since it would be manifestly unjust to the unfortunate owner of the saved property to have the whole amount of the award increased because of the number of the salvors. But such injustice has been done.¹

The lien upon the *res* for costs is of higher rank than that for salvage, since the services of the court officers is necessary to the recovery of the award; hence, it must be allowed, and first paid; and it should be paid out of the salvage money.²

Where the services were "below a salvage service," compensation was awarded in one instance.³

In one proceeding, all rights of salvors, co-salvors, intervenors, claimants, court officers, etc., should be definitely settled, and the respective ranks as lien holders fixed, so that the whole cause may be appealed, if necessary.⁴

¹ Ryan v. Cato, Bee, 241.

⁴ Steamboat New England, 3 Sumn.

² The Nat. Hooper, 3 Sumn. 543. 495.

³ The Ship Arctic, Bee, 232.

CHAPTER XLVIII.

COLLISION.

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§ 515. **Rules of Navigation.** For damage by collision, the action *in rem* lies, (prescribed in the fifteenth of the Admiralty rules,) and it is styled "A cause of Damage, Civil and Maritime."

Steam navigation has become so general on lakes and rivers, and has so greatly increased upon the sea; and navigation of all kinds has grown to such extent, that collisions have not ceased to be of frequent occurrence, notwithstanding the tendency of modern appliances of science to prevent them. Regulations have been adopted by maritime countries, which have received general acquiescence, been incorporated into the law of the sea, and applied to steamships and steamboats to determine their relations to each other, and to sailing vessels, and the relations of the latter to steamers. These regulations have as much title to general regard as the nautical rules which have always governed sailing vessels among themselves. Congress has adopted regulations which accord with general commercial usages.

A prolific cause of collision is the violation of the regulations concerning lights. Sometimes the violation consists in the total absence of lights; sometimes in the use of other than the prescribed colors, or from putting the lights in improper positions. Neglect of the required fog signals is another cause; but infringement of the sailing and steering rules is the most fruitful source of collisions. Among the more frequent faults are failure to put the helm to port when in danger of striking

an approaching vessel; and failure to keep out of the way, when the wind is on the port side and another vessel is crossing with the wind on her starboard side, (both being sailers). When the former is close-hauled and the latter free, the rule is reversed. If both have the wind on the same side, or one has it aft, the *onus* is on the sailer to windward to avoid the other which is to leeward. Steamers meeting must pass on the port side of each other; and, to escape danger of contact, the steamer, which has another steamer on her starboard side, is the responsible one if she does not keep out of the way. Steamers must go at moderate speed in a fog; and they are bound, in all weathers, to slacken speed, and stop and reverse, whenever any of these precautions are necessary to avoid collision. One vessel overtaking another, bears the obligation of avoiding contact. But it was manifestly impossible for the legislator to foresee all the complicated circumstances that must arise in various collisions; so he made this, which is the most important rule of all: "In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger."

The regulations **must** be judged by circumstances, both by the navigator in obeying, and the court in construing them. Accordingly we find many important considerations appearing as factors contributing to the judgment-result, in collision causes: the character of the scene or place of collision; the absence of a lookout or the fault or negligence of the lookout; the incapacity of captain or pilot, or the want of such officer when required; the unseaworthiness of a vessel; the violation of local port rules, and many other things which often concern the question whether the vessel preceeded against is, under all the circumstances, responsible for the damages caused by the collision, in a case on trial.

Illustrations, drawn from the reports, will probably present this subject better than any didactic disquisition; yet they necessarily must leave it subject to such further variety of modification or extension as new cases shall require from time to

time; so that, after all, the only invariable rule is that whatever vessel shall wrongfully do damage to another not in fault, must be held responsible for the reparation of the injury done.

It may be remarked, in a general way, however, that the grounds of action are found in the violation of the rules of navigation;¹ and in other wrongs done which oblige the vessel at fault to repair injuries, on general principles of law.

§ 516. **Classification: Presumption Favors Weaker Vessels.** Vessels are divided into two general classes: steam and sail. The former are subdivided into ocean steamers and river steamboats; wheel steamers and propellers; side-wheel and stern-wheel steamboats; tugs, steam ferry boats, etc. The latter consist of ships, schooners, sloops, skiffs, etc. A third class might be named, composed of canal boats, flat boats, wharf boats, row boats, etc.

A steam vessel when wholly propelled by sail, at the time of collision, is classed with sail vessels, but not when both steam and sail are used.²

In the application of the rules of navigation, and of the general law governing damages, the classification of vessels must necessarily be kept in view. More must be required of the stronger than of the weaker vessel; more of a steamer than of a sailer; more of one favored by the wind than of one to which the wind is adverse; more of a vessel in motion than of one at rest; in a word, more is required of the vessel which, by reason of its strength, manageability and favorable circumstances, may avoid disaster, than of a vessel so situated as to be comparatively helpless.³

¹ Rev. Stat. § 4233.

² The Hyppodame, 6 Wall. 216; The Carroll, 8 Wall. 302; The Fairbanks, 9 Wall. 420; The Corsica, 9 Wall. 630; The Scotia, 14 Wall. 170; The Continental, 14 Wall. 345; The Chesapeake, 5 Blatchf. 411; The Huntsville, 8 Blatchf. 228.

³ Steamer Louisiana, (Haney v. Russell et al.) 23 How. 287; Steamer Oregon, 18 How. 570; Scr. Fanny Crocker, 23 How. 448; St. Tug Hec-

tor, 24 Id. 110; St. Bt. Dr. Robertson, Id. 228; Str. New Philadelphia, 1 Black. 62; The Hyppodame, 6 Wall. 217; The Carroll, 8 Id. 302; The Syracuse, 9 Id. 672; The Fanny, 11 Id. 238; The Lucille, 15 Id. 676; The Commerce, 16 Wall. 33; The Wenona, 19 Id. 41; The Falcon, Id. 75; The Abbottsford, (8 Otto,) 98 U. S. 440; The Benefactor, (12 Otto,) 102 U. S. 214.

"It is a rare occurrence in the history of cases of this kind," says Judge DAVIS, "where a sailing vessel and steamship approaching each other in opposite directions, or on intersecting lines, have come in contact, that the sailing vessel has been adjudged to be in fault." But, in the case he was deciding, the weaker vessel, the sailer, was held in fault.¹ And the rare occurrence has been since repeated, even in cases where steamships have been not wholly free from blame, when the immediate cause of the disaster was attributable to the sailing vessel.²

The presumption generally is against the steamer when collision has taken place with a sailing vessel:³ the former being the more manageable.

It is not only between vessels propelled by steam, and those moved by wind, that inequality exists. A side-wheel steamboat is far more manageable than a stern-wheeler; a screw propeller differs from both in its manipulation; sailing vessels of different rig are differently maneuvered.

Between two equal sailing vessels, the *onus* of avoiding collision is usually upon the one which the wind favors, other things being equal;⁴ for she would be the stronger by position.

The rule favoring the less manageable craft is liberally applied to canal boats;⁵ and to flat boats.⁶

But, however weak and unmanageable the smaller craft may be, the circumstances may be such that the colliding steamer would not be blameable. When a man, in a skiff, saw a steamboat two hundred feet off, it was presumed that he had time to get out of the way.⁷ So, a canal boat was held in fault, as

¹ The Potomac, 8 Wall. 590; The Propeller Monticello, 17 How. 152.

² The Scotia, 14 Wall. 170; The Java, Id. 189; The Clara, (12 Otto,) 102 U. S. 200; The Illinois, 103 U. S. 298.

³ The New Orleans, 8 Ben. 101; The Lizzie Mayor, 8 Ben. 333; The Adriatic, 9 Ben. 98; The Zodiac, Id. 171; The Java, 14 Blatchf. 524; The Eleanor, 17 Blatchf. 88; Steamboat New Jersey, (Newton v. Stebbins,) 10 How. 586; The Genesee Chief, 12 How. 450.

⁴ The Greene County Tanner, 8 Ben. 396; The Ellen Tobin, Id. 446; The F. W. Gifford, 7 Bissell, 249; 17th Admiralty Rule; The Victoria, 10 Phila. 292.

⁵ The General McCullum, 8 Ben. 437; The Colon, Id. 512; The Titan, Id. 7; The C. Columbus, Id. 239, 510; Deems v. Albany and Canal Line, 14 Blatchf. 474.

⁶ Freitz v. Bull & Co., 12 How. 466; Culbertson v. Shaw, 18 How. 584.

⁷ The Missisquoi, 8 Ben. 6.

well as the steamer with which it collided, because of insufficient fastening.¹

§ 517. **Lights and Lookout.** In case of a night collision between a steaming and sailing vessel, the failure of the former to have a proper lookout will be taken as *prima facie* evidence that she was the one in fault.² But when there was no delinquency as to the lookout, and the steamer backed as soon as the danger of contact with the sailer was apparent, there was no cause of action against her for the collision.³ Where, however, the schooner's lookout saw an approaching steamer, yet failed to report to the wheelman, she could not recover for the consequential collision, though the steamer was also at fault by reason of attempting to pass too near the schooner.⁴

Gross fault was predicated of a steamer coming through fog at the rate of sixteen miles per hour, on Long Island Sound, and striking a vessel which lay at anchor.⁵ And also when, at half that speed, and without proper lookout, one came down the Hudson at night, with wind and tide, and struck an anchored vessel.⁶ And though the New York statute required the anchored vessel to have a light under such circumstances, yet the Supreme Court held the steamboat wholly in fault, and decided the case under the general maritime code. That code, however, would not excuse the injured vessel's want of light.⁷ It was held that where local regulations had been made, assigning positions to different species of boats, in a harbor of the Mississippi, such rules were binding if they had been duly promulgated;⁸ and, when a steamboat, in the night, sunk a flat boat

¹ The City of Paris, 14 Blatchf. 531.

² The Hasbrouck, 3 Otto, 405; The Schooner Catharine, 17 How. 170; The Java, 14 Blatchf. 534; St. John, (Appellant,) v. Libellants of The Neptune, 10 How. 557.

³ Steamship Columbus, (Peck v. Sanderson,) 17 How. 178; The Faragut, 10 Wall. 334: a case in which lookout would have been ineffective. The Fanny, 11 Wall. 238.

⁴ The Fanita, 8 Ben. 11.

⁵ McReady v. Goldsmith, 18 How. 89; The Ariadne, 13 Wall. 475: importance of lookout; The Manistee, 7 Bissell, 35; The Shady Side, 8 Ben. 424.

⁶ Steamboat New York, 18 How. 223; The Bridgeport, 14 Wall. 116; The Continental, 14 Wall. 345; Balt. & O. R. R. Co. v. Wheeling Transportation Co., 32 Ohio State, 116.

⁷ Brig James Gray, 21 How. 184.

⁸ The Steamer Southern Belle, (Calbertson v. Shaw,) 18 How. 534.

in proper place in such port, she was held liable for the damage.¹ When tied to the shore, no light on the flat boat was required,² even had she been a vessel of any kind moored to the bank of a river and not in port at any landing place. The steamer will not be exonerated for colliding with a sailer or barge at anchor or sailing out of the usual track of steamers, by any plea of darkness, rain, absence of light on the sailer, etc.³ And this was held, though the sailer had had neither pilot nor sufficient light; but the court intimated that sailers without such precautions would not in all cases of collision be held free from fault. Sailing vessels are strictly held liable for collisions caused by contravention of regulations as to lights, lookouts, etc., as well as to the other rules of navigation.⁴

A whaler was held in fault for not having colored lights, such as were prescribed by a statute passed after she had left the country on her voyage, and of which the captain had never heard.⁵

§ 518. **Sailing and Steering.** The general rule is for a sailing vessel to keep her course when meeting a steamer.⁶ But that the latter is not bound to take measures to avoid a collision until some danger of one is present, was held in the case of *The Free State*; and the Supreme Court therein made some exposition of the sixteenth article established by Congress for the avoidance of collisions, saying that each vessel may assume that the other will reasonably perform its duty under the navigation laws.⁷ Where a vessel, being towed into port by a steam-tug, came into collision with a vessel at anchor, and the tug and anchored vessel were both in fault, both the latter were liable to the towed vessel thus injured without fault of her own.⁸

A steamer was held liable for collision at sea near the Long

¹ *Id.*

² *Steamer Gipsev, (Ure v. Coffman, 19 How. 57.*

³ *N. Y. & Va. Steamship Co. v. Calderwood, 19 How. 241.*

⁴ *The Petunia, 8 Ben. 349; The Vincenzo Perotto, Id. 483; The Osseo, Id. 518; The Jesse Williamson,*

Jr. 17 Blatchf. 106.

⁵ *The Ontario and The Helen Mar, 2 Low. 40.*

⁶ *Crockett v. Newton, 18 How. 581.*

⁷ *The Free State, (1 Otto.) 91 U. S. 200.*

⁸ *The Brig James Gray, 21 How. 184.*

Island shore, because it occurred, through fault of the faster craft, when the injured sailing vessel was, (while converging to the steamer's track,) close-hauled upon the wind.¹

One tug ran into another, when both were approaching a sailing vessel to get the towing of her; and, one of them having violated the usual rules governing such approaches, was held wholly liable for the damage done.²

Propellers, while towing vessels, are not within the liberal rule which applies to sailing vessels coming in contact with steamers;³ but when the victim had been delinquent in duty on her part, (though a sailing vessel on a lake,) the tug was held to only half the damages.⁴

The presumption of blame, however, attaches to the propeller, when the proof is that the sailer kept her course.⁵

The Abbotsford, attempting, without slackening speed, to pass two schooners by going between them while they were beating down the Delaware river, (the steamer going in the same direction,) sunk one of the schooners while the injured vessel was properly trying to avoid collision with the other sailer, and was held to damages for the loss.⁶ Another, passing between schooners when meeting them, in Hampton Roads, was liable for collision with one of them.⁷ The steamer had successfully passed between two, but struck a third, which was in the rear. But, when two schooners were beating up Narragansett Bay, and one of them was sunk by a propeller; and it appeared that the injured vessel had been properly maneuvering with regard to the other schooner but not with regard to the steamer, the steamer was held not liable for the loss.⁸

In the collision which took place in 1855, between the steamships Jamestown and Pennsylvania, on Elizabeth river, in the night, the latter was held the faulty party because her master

¹ N. Y. & Liverpool Steamship Co. v. Rumball, 21 How. 372.

² Sturgis v. Clough, 21 How. 451.

³ The Keystone State, 22 How. 461; The Steamer Syracuse, 12 Wall. 167; The Marguret, (4 Otto,) 94 U. S. 494; The Civilta and The Restless, 103 U. S. 699.

⁴ The Sunny Side, (1 Otto,) 91 U. S. 208. See The Fidelity, 16 Blatchf. 569; The Kirkland, 3 Hughes, 641.

⁵ The Colorado, (1 Otto,) 91 U. S. 692.

⁶ 98 U. S. 440.

⁷ The Old Dominion, 8 Ben. 221.

⁸ The Amos C. Barstow, 8 Ben. 401

remained in the saloon nearly to the time of the contact, her helm was erroneously put to starboard, and there was other mismanagement.¹

Not going to the right of the channel's centre, as required on the Hudson river, was held ground for holding a vessel responsible for collision with another.²

A vessel was held liable for collision as in case of tort, under the maritime law; and the wrong done, in consequence of the pilot's negligence, was not taken out of the cognizance of that law by compliance with the local law which required the employment of a pilot.³

Particularly, in crowded channels and in the vicinity of wharves, will steamers be held to the rules, as to putting their helms to port, etc.⁴ "An error committed by the vessel required to keep her course," said Judge CLIFFORD, in *The Fairbanks*, "after the approaching vessel is so near that the collision is inevitable, will not impair her right to recover for the injuries resulting from the collision, if she was otherwise without fault, for the reason that those who put the vessel in that peril are chargeable with the error," etc.⁵

A pilot of a steamboat having failed to give another steamboat room to pass, when the courses of the two steamers crossed, caused his boat to be decreed wholly at fault for collision—the latter being obliged to encounter a cross tide.⁶

Between two steamboats, more is required of the one ascending a river than of the other descending, as she is the more manageable as to backing to avoid contact: hence it was held that if a steamboat, injured by a collision on the Ohio, observed the customary rule which required a descending boat to keep in the middle of the stream and stop her engines when meeting an ascending boat, she is not in fault for not backing, when it was uncertain whether the ascending boat would pass ahead or

¹ *Steamship Pennsylvania*, 24 How. 307.

² *The Vanderbilt*, 6 Wall. 225.

³ *The China*, 7 Wall. 53.

⁴ *The Johnson*, 9 Wall. 146; *City*

of Paris, 9 Wall. 634; *The Favorita*, 18 Wall. 598.

⁵ *The Fairbanks*, 9 Wall. 420; *St. Ship Co. v. Rumball*, 21 How. 384; *Bently v. Coyne*, 4 Wall. 512.

⁶ *The Frank Sigel*, 14 Blatchf. 480.

astern.¹ Where collision was caused by the neglect of the ascending boat to keep near the right bank of the Mississippi while the descending was entitled to the middle of the stream, the fact gave no cause of action, though the former was by collision destroyed.²

When a tug boat was descending the Mississippi river, with a vessel under each wing and a third in the rear, and had one of her charge dashed by an ascending ocean steamer, the latter was held liable to damages³ under the evidence.

Under the regulation, that a steamer crossing another's path, so as to endanger collision, should keep clear when the other is to starboard, one violating the rule was held responsible for the collision.⁴ "The propeller," Judge STORY said, "was off the starboard of the Columbia. It therefore was the duty of the latter to keep out of the way. * * * It was a fault in the Columbia that she did not port her helm and go astern of the other vessel."

A schooner while racing to get into harbor, had that circumstance construed against her, and she was held in fault for collision.⁵ Though, as between sailing vessels, the one having the wind is *prima facie* bound to adopt such a course as will prevent collision with another sailer, yet she may keep her straight course where the circumstances justify it.⁶ She may veer from her straight line to avoid natural obstructions to navigation, though approaching a steamer in such direction as to involve risk of collision, since the rule, which requires her to keep her straight course, allows of such an exception.⁷

§ 519. **Measure of Damage.** Two vessels, both in fault, having collided and thus caused the loss of the cargo of a third vessel which was free from blame, one of them was libelled *in rem* by the owners of the cargo, for the loss. The District Court gave judgment for one-half the damage, holding that

¹ Williamson et al. v. Barrett et al.
13 How. 101; The Galatea, (2 Otto,) 92 U. S. 439.

² Goslee v. Shute, 18 How. 463.

³ The Crescent City, (Snow v. Hill,) 20 How. 543.

The Columbia, 10 Wall. 246.

⁵ The Spray, 12 Wall. 366.

⁶ The Mary Eveline, 16 Wall. 348.

⁷ The Hasbrouck, (3 Otto,) 93 U. S. 405.

the steamboat *Atlas*, the *res* of the suit, should be condemned only for a moiety, since the steam-tug *Kate*, (the other vessel at fault,) was equally liable for damages. Both the libellants and the *Atlas* appealed; and, the Circuit Court having affirmed the decree, both went up to the court of highest resort. But the Supreme Court reversed the decree and directed that the entire damage be adjudged against the *Atlas*—not that she was more to blame than the *Kate*, or more indebted than the *Kate*; but that she was the sole party made defendant. The moiety rule was not thought binding on the libellants, owners of the lost cargo.¹ It had previously been held that where an injured libellant brought suit against two colliding vessels, the judgment of damage should not be *in solido*;² and, prior to that time, that the rule ought not to be so stringently executed as to wrong such third persons—creditors by reason of the damage.³ When two vessels had been decreed indebted (for damage to the libellant,) one being a steam-tug and the other the ship in tow—the tug having given a stipulation for \$16,000—the judgment being for \$24,000—half against either defendant—the Supreme Court, on appeal, amended the decree so as to further provide that any balance of the moiety decreed against either the tug or the tow, which the libellants should be unable to collect, should be paid by the other, or by her stipulators, to the extent of her stipulated value beyond the moiety due from her.⁴ And this is in accord with the cases just previously cited, on the subject of moiety, though this principle was not then under discussion. And all of these cases were reaffirmed, as to this principle, at the same term in which the last cited case was decided.⁵

When a vessel, by reason of collision, is beached, and afterwards raised and re-launched, the damages are measured by the cost of restoring her to her previous condition.⁶ It is said that the delay of a vessel to arrive timely into port, with her cargo,

¹ The *Atlas*, (3 Otto,) 93 U. S. 302. Reaffirmed in *The Juniata*, Id. 337.

² The *Alabama* and the *Gamecock*, (2 Otto,) 92 U. S. 695.

³ The *Gregory*, 9 Wall. 516.

The *Virginea Ehrman* and the *Agnese*, (7 Otto,) 97 U. S. 309.

⁵ The *City of Hartford* and The *Unit*, Id. 323.

⁶ The *Sch. Catherine*, 17 How. 170.

by reason of a collision, and loss thereby, cannot be considered a part of the damage; but we believe this turned upon the local law of England.¹ But, in this country, the rate of freight which would have been earned, and demurrage, are grounds for damage caused by collision.²

The value of the vessel lost having been fixed by stipulation as the value of the vessel that had caused the loss, that sum was all that the libellants could recover.³

"*Restitutio in integrum* is the leading maxim" says Judge CLIFFORD, treating of the measure of damages in collision cases; "and where repairs are practicable, the general rule, followed by the admiralty courts in such cases, is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred."⁴

Where two colliding steamboats, (or two vessels of any kind,) are both at fault, the damages must be adjusted by both: neither can recover wholly of the other.⁵

Assessment of damage for collision, by an officer appointed by the District Court, affirmed by the Circuit Court, will not be disturbed by the Supreme Court when the record does not contain the evidence.⁶ In cases of doubt as to which colliding vessel was in fault, no damage will be awarded to either.⁷ Where both are in fault, the damages are added—divided by two—and thus apportioned.⁸

When two vessels are equally to blame for injury to a third, they will be condemned to bear equal shares of the loss.⁹

Damages were equally divided, when one vessel was flagrantly at fault, because the other did not use the means in her power to prevent contact.¹⁰ Again, though an ocean steamer was at fault for running too fast through the fog, the sailing

¹ *Smith v. Coudry*, 1 Howard, 28.

² *Williamson et al. v. Barrett et al.*, 13 How. 101.

³ *The Ann Caroline*, 2 Wall. 538.

⁴ *The Baltimore*, 8 Wall. 385; *The Atlas*, (3 Otto,) 93 U. S. 307; *The Cayuga*, 14 Wall. 270.

⁵ *Chamberlin v. Ward*, 21 How.

548; *The Gray Eagle*, 9 Wall. 505; *The Nichols*, 7 Wall. 656.

⁶ *The Cayuga*, 16 Wall. 177.

⁷ *The Grace Girdler*, 7 Wall. 196.

⁸ *The Sapphire*, 18 Wall. 51.

⁹ *The Connecticut*, *The Stevens* and *The Othello*, 103 U. S. 710.

¹⁰ *The Maria Martin*, 12 Wall. 31.

bark which she struck was made to bear half the damage for not blowing a fog-horn.¹

Judgment against the owner for collision, cannot exceed the value of the ship, if he has abandoned her to the libellants.² Even if he has not abandoned, he is not liable beyond his interest in ship and cargo, for any loss occasioned without his privity.³

The libellee cannot, in the Supreme Court, set up, against the libellant, damages incurred from the latter, by way of recouping, when such pleading had not been made in the lower courts,⁴ though the libellant has been allowed to urge grounds not alleged in his libel.⁵

§ 520. **Defenses, Etc.** Payment of total loss by underwriters to the libellants, is not a good defense to an action for collision.⁶

A defense to a libel for collision, "that the injured vessel lay in an improper manner and in an improper place," is too indefinite.⁷ An action *in rem* for collision cannot be successfully defended by the claimant's proving the damage to have occurred when the vessel at fault was under charge of a pilot in conformity with statute.⁸

Negligence cannot be inferred from the fact that a vessel was on fire: it must be proved.⁹ It is no defense that the collision was caused by a hurricane, if it could have been avoided.¹⁰

The Supreme Court presume in favor of a decree in an admiralty case, in which both the lower courts have concurred.¹¹ The finding of facts by the Circuit Court, in an admiralty case, is conclusive upon the Supreme Court, since May 1, 1875, when the act of Congress so providing, went into effect; this

¹ The Pennsylvania, 19 Wall. 125.

² Norwich Co. v. Wright, 13 Wall. 104; Act March 3, 1851, (9 Stat. at L., 635,) §§ 1, 3, 4, 6.

³ The Atlas, (3 Otto,) 93 U. S. 302; The Benefactor, 103 U. S. 239; Rev. Stat. § 4283.

⁴ The Sapphire, 18 Wall. 51.

⁵ The Steamer Syracuse, 12 Wall. 167.

⁶ The Monticello, 17 How. 152.

⁷ The Commander-in-Chief, 1 Wall. 43.

⁸ The Merrimac, 14 Wall. 199.

⁹ The Buckeye, 7 Bissell, 23.

¹⁰ The Thule, 3 Woods, 670; The Louisiana, 3 Wall. 164; The Merrimac, 14 Id. 199. But, see The Morning Light, 2 Wall. 550; The James Gray, 21 How. 184.

¹¹ The Wheeler, 20 Wall. 385.

rule was applied in a case where the facts showed a steamer at fault when colliding with two schooners.¹

The Supreme Court have gone outside of the libel to find the immediate cause of action.² And they have allowed a steam-tug to appeal from the Circuit Court, from a decree against her in which she had acquiesced by not appealing from the District Court to the Circuit Court. "Objection is made," Mr. Justice CLIFFORD said, "that the owners of the steam-tug could not properly appeal to this court, as they did not formally appeal from the District Court to the Circuit Court, but it is not necessary to decide that question, as it is quite clear that the decree must be affirmed against the tug as well as the tow. Nor is the court prepared to admit the validity of the objection, as the record shows that the owners of the tow signed a written stipulation before the decretal order was entered in the District Court, that they, as the owners of the ship, [the tow,] would assume the entire conduct of the defense, and that they would answer and pay whatever sum the libellants should recover in the case against both vessels. Undoubtedly, the general rule is, that a party who does not appeal cannot be heard in opposition to the decree. Still, it appears in this case that an appeal from the District Court to the Circuit Court, was taken from the entire decree, and by a party who represented the entire interest of the losing party in the suit. Well founded doubt, may, perhaps, arise as to the regularity of the proceeding, but it is not necessary to solve that doubt in the present case. Suppose the appeal is correctly here, we are all of the opinion that the decree of the court below was correct."³

But, suppose the judges had been all of the opinion that the decree was wrong: could they have reversed it so far as concerns its final judgment against the tug? Could the tug delegate its defense and appeal to a co-defendant, from the District to the Circuit Court, and then resume the litigious character at the following stage? Are we to understand, in this case, the Su-

¹ The Abbotsford, (8 Otto,) 98 U. S. 440; The Adriatic, 103 U. S. 730.

² The Steamer Syracuse, 12 Wall. 167.

³ The Mabey and the Cooper, 14 Wall. 204, 214.

preme Court decision, "Decrees Affirmed," as having reference to the decree of the District Court against the tug from which no appeal had been taken by the tug? More than one decree was affirmed; yet but one had been appealed from the District Court.

CHAPTER XLIX.

OTHER MARINE TORTS.

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§ 521. **The Lien Maritime in the Absence of an Admiralty Rule.** In the case of *The Panama*,¹ in which there was judgment and exemplary damages, in the sum of fifteen thousand dollars, against that steamship in a proceeding *in rem*, for the breaking of the libellant's leg, (she being a passenger and having fallen down an open hatchway,) the Supreme Court, (to which the cause had been brought from a territorial court of Washington Territory, sitting in admiralty,) said: "Injuries of the kind alleged give the party a claim for compensation, and the cause of action may be prosecuted by a libel *in rem* against the ship; and the rule is universal that if the libel is sustained, the decree may be enforced *in rem*, as in other cases where a maritime lien arises. These principles are so well known and so universally acknowledged that argument in their support is unnecessary."

The case turned upon the jurisdiction of the territorial courts to try admiralty causes; and the court held that it was co-extensive with the District Courts of the United States, when fully conferred by Congress; and added: "Maritime cases, in every form of admiralty proceeding, have been heard and determined in the territorial district courts, and, by appeal, in the supreme courts of the territories. And they cited several

¹ *The Panama*, (11 Otto,) 101 U. S. 453; *The Kirkland*, 3 Hughes, 641.

territorial decisions in admiralty;¹ and an unreported decision of the United States Supreme Court upon an admiralty decision in a territory.²

The Supreme Court have thus fully recognized the lien against a vessel for tort as a maritime lien under the general law, for we look in vain in their prescribed rules of admiralty practice, and in the statutes of Congress, to find any special creation of the lien. The only mention in the rules is that which confines one species of action for tort—assault and battery,—to the personal remedy,³ unless we turn to Rule 23, concerning the titles of causes, in which it is prescribed: “All libels in instance causes, civil or maritime,⁴ shall state the nature of the cause; as, for example, that it is a cause civil and maritime, of contract, or of *tort* or damage, or of salvage, or of possession, or otherwise, as the case may be; and if the libel be *in rem*, that the property is within the district,” etc. Thus, we see—conceding the right to give or withhold maritime remedies by rules—that the action *in rem* for tort is limited to torts other than assaults and beatings; and that it is not at all expressly, but only impliedly recognized by the rules, in such other cases. Were the strict adherence to court rules which is evinced with regard to the action of material men for repairs and supplies to vessels in home ports, maintained with respect to the action of “tort and damage,” the latter might possibly be ruled out of court as not authorized by United States maritime law, though fully authorized by unqualified maritime law. Much of the reasoning in the case of the *Lottawanna*⁵ would plausibly apply.

But, so firmly is this remedy intrenched, as concerns the “cause of tort, civil and maritime,” that the Supreme Court have pointedly said, (the particular cause of action being that a steamship had broken a lady’s leg by reason of having an open hatchway into which the libellant had fallen,) “The rule

¹ *Cutter v. Steamship*, 1 Oregon Rep. 101; *Price v. Frankel*, 1 Wash. T. 43; *The Steamship Northerner*, Id. 91; *Griffin v. Nichols*, Id. 375; *The City of Panama*, Id. 320. See *Brunswick Bank v. Yankton Co.*, 101 U. S. 129.

² *Steamship Northerner v. Steam-tug Resolute*, Dec. Term, 1863, U. S. Sup. Ct.

³ Rule 16.

⁴ Evidently meaning “civil and maritime.”

⁵ Ante, Chap. xliii.

is universal that if the libel is sustained, the decree may be enforced *in rem* against the ship, as in other cases where a maritime lien arises. These principles are so well known, and so universally acknowledged that argument in their support is unnecessary."¹ There does not seem to have been any territorial statute creating a lien. The general maritime law was fully recognized, as it always is by the court, unless some one raises the question with regard to such admiralty liens as have previously been sometimes denied. In railroad injuries, the rule is the reverse: no lien till judgment.²

§ 522. **State Liens for Marine Torts.** Where State liens for torts have gone beyond the general usage that has prevailed in countries which fully maintain the maritime law, for instance, where lien was given against a vessel for tort resulting in the death of the injured person with survival of action, the Supreme Court held that such maritime lien might be enforced in the State court, in the absence of any statute of the United States applicable to the case.³

The case had arisen in Indiana, and was for damage for tort causing death. Previously, one had come up from Rhode Island, instituted by the administrator of the injured deceased, against the steamboat company owning the tortuous vessel;⁴ in both States there were statutes creating the lien and conferring the right of action by representatives after the death of the injured person.

The case of a State creating a lien with survival of action, when death results from tort, is very different from that of a State legislating a material man's lien into the maritime code; for no such survival of action seems to have been known to the civil law or the maritime system. The survival of the right of action for injury, resulting in death, is not known to the common law; but in several States of this Union it is now authorized by statute. The idea heretofore has been that, (as a wife has no property in her husband; the parent, none in his

¹ The Panama, above cited.

² Sherlock v. Alling, (3 Otto,) 93 U.

³ White v. Ry. Co., 52 Iowa, 97; S. 99.

The B. C. R., etc., v. Verry, 48 Iowa, 458.

⁴ The Steamboat Co. v. Chase, 16 Wall. 522.

child except for service, etc.,) there could be no exemplary damage recovered for killing the husband or child. The principle seems wrong, however; for one may be damaged pecuniarily by the loss of that which is not property.

§ 523. **Rank of the Lien.** The Supreme Court have not only emphatically recognized the lien for tort as a general maritime one, but they have given it a very high rank. They say in a comparatively recent case: "Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other, if they arise from the same cause."¹ In the absence of this opinion from such a high source, it would have seemed that both the salvor's and the seaman's lien should be ranked higher; and also that for money borrowed, if secured by bottomry.

§ 524. **Various Causes of Action.** No specification need be here made of the various subsidiary causes which may give rise to the action of tort for damages. From acts of wanton spoliation, and wrongs causing mutilation or death, down to injury caused by not proceeding to port,² and for gaining a wrongful possession,³ there is a wide range. Many of the reported cases were *in personam*, but they serve to illustrate the "cause of tort civil and maritime," which may be brought against a person or a thing.

Judge STORY held that the cause was based upon a maritime contract, where passengers had sued for maltreatment by the master of a ship, upon a voyage; the contract, we understand, always implying good treatment though expressing only the agreement to convey the passengers from port to port.⁴ And the cause has been more than once maintained after abduction on land; for it was held that the tort was continued on sea, and was therefore actionable in admiralty.⁵

"Causes of spoliation, civil and maritime," are nothing more

¹ *Norwich v. Wright*, 13 Wall. 122.

² *Oakes v. Richardson*, 2 Low. 173.

³ 528 Pieces of Mahogany, 2 Low. 323.

⁴ *Chamberlain v. Chandler*, 3 Mason, 242.

⁵ *Steele v. Thacher*, 1 Ware, 91; *Plummer v. Webb*, 4 Mason, 380; *Sherwood v. Hall*, 3 Sumner, 127.

than one species of the cause of tort; but where they are "military and maritime," they belong to the law of prize. Of an action such as these, our Supreme Court deprecatingly said: "We are now called upon to give general damages for *plunderage*; and if the particular circumstances of any case shall hereafter require it, we may be called upon to inflict summary damages to the same extent as in ordinary cases of marine torts. We entirely disclaim any right to inflict such damages."¹ But a privateer, acting beyond authority, has been mulct in damage for tortuous acts.²

§ 525. **Causes "Civil and Maritime" Necessarily on the Instance Side.** Judge LIVINGSTON, of the southern district of New York, in the case of the *Amiable Nancy*,³ was in a quandary whether the cause was "military and maritime" or "civil and maritime;" but he held the distinction immaterial, saying that as the district courts possess all the powers of a court of admiralty, it was not important to determine under what particular branch of the jurisdiction the case was cognizable; and the Supreme Court did not settle the point for him, but merely said, in general terms, "the jurisdiction of the District Court to entertain this suit, in virtue of its general admiralty and maritime jurisdiction * * * has been so repeatedly decided by this court, that it cannot be permitted again to be judicially brought into doubt."⁴

Had either court noted the distinction between things hostile and things indebted, it would have found that the action was to recover money in reparation of damage in a cause of tort. It was not against a hostile thing to have it confiscated as prize. It was therefore clearly a cause of spoliation, civil and maritime, belonging, of course, to the instance side of the admiralty. It did not matter that the *Nancy* had been boarded by an American privateer during our last war with England, plundered, etc., for the action for damages, (by a neutral owner,) was not based upon any belligerent rights; but, on the contrary, it necessarily assumed that the privateer was not protected by any

¹ *La Amistad de Rues*, 5 Wheat. 385.

² *L'Invincible*, 1 Wheat. 238.

³ *The Amiable Nancy*, 1 Paine, 111.

⁴ *The Amiable Nancy*, 3 Wheat. 546.

immunity under the *jus gentium*. Had the cause belonged to the prize side of the admiralty, manifestly the civil action for damages estimated in money could not have been maintained.

Mr. Conkling, in commenting upon this case, made the remark, "The distinction," between the prize and the instance side of the admiralty "does not appear, therefore, to be in any other respect essential in our courts, than as it concerns the form of the proceedings proper to be instituted for the confiscation of the property seized, where sent in for adjudication"—from which it may be inferred that he did not then have in view the distinction between things hostile and things indebted when brought into the admiralty courts.

It is true that admiralty courts, on the instance side, declare the forfeiture of things guilty, but such causes are all "civil and maritime:" they never, on that side, decree the confiscation of things hostile, which are "military and maritime," when seized upon navigable waters. The distinction in proceedings *in rem* between the guilty, the hostile and the indebted is well grounded in legal science; and it is one which the profession will never wittingly let go, when it shall have gained its natural place in jurisprudence.

Owners of privateers and the privateers themselves have been repeatedly held liable in causes civil and maritime, for the torts of the master and ship.¹

§ 526. **Limitation of the Owner's Liability.** The shipper of merchandise or freight has a lien on the vessel for any damage to it caused by the fault of the master or vessel, which he may enforce *in rem*.²

Owners of vessels, by the general maritime code, are not responsible for the master's liabilities *ex delicto*, beyond the value of the vessel and freight.³ And it has been held that

¹ St. Jean Baptista, 5 Rob. 33; The Karasan, Id. 291; Die Fire Damer, Id. 357; Nostra Signora, 1 Dodson, 290; Owners of Three Brigs, 1 Dal. 95; The Amiable Nancy, 3 Wheat. 546; Le Amistad de Rues, 5 Wheat. 384; The Mary, 1 Mason, 365.

² The Rebecca, 1 Ware, 188; The Phebe, Id. 263; The Waldo, Davies, 161; The Scr. Reeside, 2 Sumner, 567; The Brig Casco, Davies, 184; The Robert Morris, 6 Ala. 50.

³ Stinson v. Wyman, Davies, 172; The Rebecca, 1 Ware, 188. But see 3 Kent, 217.

they are not bound at all, nor is the vessel, when the captain's acts are beyond the scope of his duty.¹ But this exemption must be received with cautious qualification, since all the captain's responsibilities *ex delicto* are, in a sense, beyond the scope of the duty for which he was employed.

The general maritime restriction of the owners' liability to the value of the vessel and freight, above mentioned, has been thought not applicable to this country, unless so ordained by statute; at least, it has been so held by those who take the limited view of admiralty jurisdiction.² Several States, therefore, had enacted statutes limiting the liability, before Congress, in 1851, passed an act to that effect.

Within the scope of his employment, however, the master not only binds the vessel, but the owners, to the amount of her value, to any person receiving injury by him, by tort or otherwise.³ His refusal to deliver goods to a purchaser who holds the bill of lading, renders the vessel liable.⁴

¹ *The Druid*, 1 W. Rob. Adm. 391; *The Waldo*, *Phebe* and *Casco*, as above cited; *Mitchell v. Chambers*, 43 Mich. 152.

² *Watkinson v. Laughton*, 8 Johns. 213; *Amory v. McGregor*, 15 Id. 24; *Oakey v. Russell*, 18 Martin, (6 N. S.) (La.) 59; *McGregor v. Kilgore*, 6 Ohio, 358.

³ *Stone v. Ketland*, 1 Wash. C. C. 142; *Purviance v. Angus*, 1 Dal. 184; *Atkyns v. Burrows*, 1 Pet. Adm. 245; *Bussey v. Donaldson*, 4 Dal. 206; *Manro v. Almeida*, 10 Wheat. 473.

⁴ *Schmidt v. The Pennsylvania*, (U. S. C. C., in Pa.) *The Reporter*, xi., 632, (1881.)

CHAPTER L.

AFFREIGHTMENT.

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§ 527. **Mutual Liens Between Ship and Merchandise.**
 The contract between the master of a ship and the merchant, by which the former agrees to carry goods for the latter in consideration of the freight, creates mutual property obligations. In the ancient apothegm, the mutuality is well and succinctly expressed: "The ship is bound to the merchandise, and the merchandise to the ship." This doctrine has been long established, "attested by a great number of juris-consults, and followed by all maritime Europe."¹

These mutual obligations give rise to mutual liens so soon as property indebtedness is the result. So soon as freight is due, there is a lien upon the merchandise for its payment; and so soon as the merchandise becomes injured or lost, there is a lien upon the ship for payment of damages. These mutual liens are always implied in the contract of affreightment; and, if the contracting parties mean to avoid them, they should expressly modify the agreement.

The contract, as usually evidenced by a bill of lading containing a brief description of the merchandise, the name of the ship and that of the master; the name of the shipper and that of the consignee, with the rate of freight and mention of the

¹ Cours de Droit Maritime, 269.

ports of departure and destination, and the clause for delivery of the cargo in good condition, excepting the dangers of the sea, is understood, in the law maritime and the law merchant, to be all that is necessary for the creation of the mutual obligations, and the contingent creation of the liens to be enforced against the debtor things respectively.

Judge STORY said broadly that whenever the maritime law gives a lien, it may be enforced *in specie*: a proposition that would include the mutual liens of which we are writing, though the case he was deciding was not one upon an affreightment contract.¹ There seems to have been no distinct assertion of the doctrine of the maritime lien growing out of such contract, till some thirteen years later, when Judge WARE held that a cause brought by libel against merchandise for freight due is a cause of admiralty and maritime jurisdiction, and that the ship-owner's lien on goods for freight is enforceable *in rem*. Commending *De Lovio v. Boit*, he condemns the strictures² upon it by Mr. Justice JOHNSON, combats the practice of referring to English precedents in maritime matters, and concludes that the views of Judge STORY had not been over-ridden by the Supreme Court.

The same learned judge decided, in a later case, that a merchant, who ships on freight, has a lien on the vessel for the loss or damage of his goods which he may enforce *in rem* in the admiralty; that, in such case, the vessel is, by marine law, hypothecated to the merchant for his damages from the time the damage is incurred, the liability and lien following her into the hands of third persons who are *bona fide* purchasers of her.³ The same views were expressed by the same judge in the case of *The Phæbe*: the lien holding in favor of the merchant against the ship, though the contract of affreightment had been with the charterers of her, through their captain.⁴

The Supreme Court of the United States, (though the case before them was one *in personam*,) followed the doctrine of Judges STORY and WARE, and held, at an early date, that the

¹ *DeLovio v. Boit*, 2 Gal. 398.

Wheat. 611.

² *Ramsey v. Allegre*, (Mr. Justice Johnson's Dissenting Opinion,) 12

³ *The Rebecca*, Ware, 188.

⁴ *The Phæbe*, Ware, 263.

admiralty jurisdiction over contracts of affreightment exists *in rem*;¹ and, a few years afterwards, they reaffirmed the doctrine in a proceeding against a ship for damage done to cargo.² The barque Griffin was libelled and condemned for not delivering cargo in Rio Janeiro, in accordance with the contract of affreightment.³

§ 528. **Freight Contracts Enforceable in Rem.** But, while the Supreme Court have repeatedly declared the contract of affreightment a maritime one, and the mutual liens enforceable respectively *in rem*, they have also held that the lien upon the cargo depends upon possession.⁴ Chief Justice TANEY, while asserting the existence of a maritime lien for freight, virtually declares it to be merely a common law lien: "As contracts of affreightment are regarded by the courts of the United States as maritime contracts, over which the courts of admiralty have jurisdiction, the ship owner may enforce his lien by a proceeding *in rem* in the proper court. But this lien is not in the nature of a hypothecation, which will remain a charge upon the goods after the ship owner has parted from the possession, but is analogous to the lien given by the common law to the carrier on land. * * * The lien of the carrier by water for his freight under the ordinary bill of lading, although it is maritime, yet it stands upon the same ground with the carrier by land, and arises from the right to retain possession until the freight is paid, and is lost by an unconditional delivery to the consignee."⁵

Mr. Justice CLIFFORD considered the law of maritime liens arising from freight contracts as settled after the above cited case of the Bags of Linseed had been decided; and he thus expresses the rule: "Such a lien is regarded in the jurisprudence of the United States as a maritime lien, because it arises from the usages of commerce, independently of the agreement

¹ The N. Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. 344.

² Rich & Harris v. Lambert, 13 How. 347.

³ Howland v. Greenway, 22 How. 491.

⁴ See Cutler v. Rae, 7 How. 729; Dupont de Nemours & Co. v. Vance et al., 19 How. 171.

⁵ Bags of Linseed, 1 Black, 112, 113.

of the parties, and not from any statutory regulation. The legal effect of such a lien is that the ship owner, as carrier by water, may retain the goods until the freight is paid, or he may enforce the same by a proceeding *in rem* in the District Court. But it is not the same as the privileged claim of the civil law, nor is it a hypothecation of the cargo."¹ The organ of the court then takes up the cases of Judge STORY, which were relied upon by counsel to show that there was hypothecation and that the lien did not depend upon possession,² and argued that they were not out of harmony with C. J. TANNEY's exposition in the case of the Bags of Linseed.

What is this but the English doctrine? Is it not precisely expressed by Lord TENTERDEN when he says, "The owner of a ship, so long as he continues in possession of the ship, is in possession also of the goods carried by her, and his right to a lien on them, for the freight due in respect to them, whether by charter-party or under a bill of lading, has never been questioned?"³ Is it not fairly expressed in a long list of English decisions settling the rule in England that the lien for freight is a lien at common law, dependant upon possession?"⁴

§ 529. **Views of Judge Story.** Yet, if Judge STORY meant that the maritime lien for freight is nothing more than this, he would hardly have been so emphatic in contrasting the English rule with ours, with regard to such liens. In the cases of *The Volunteer* and *The Logs of Mahogany*, (noticed by Judge CLIFFORD, as above mentioned,) he evidently did not understand that he was following the English rule. In the former case, he contrasted that rule with the admiralty doctrine of contracts and liens, using the following language: "The admiralty has an original, ancient and rightful jurisdiction over all maritime contracts, strictly so called, (that is, such contracts as respect business, trade and navigation to, on and over the high seas,) which it might exert by a proceeding *in rem*, in all cases where the maritime law established a lien or other right *in rem*; and by a proceeding *in personam* where no such lien

¹ *The Bird of Paradise*, 5 Wall. 555.

² Abbott on Shipping, 288.

³ *The Volunteer*, 1 Sumner (C. C.) 571; *Logs of Mahogany*, 2 Id. 600.

⁴ *Philips v. Rodie*, 15 East, 554.

or other right *in rem* existed. The courts of common law, it is true, had, on various occasions, denied, opposed and sought to restrict this jurisdiction; but their decisions have been founded on no uniform principles or reasoning, and have been, it may be so said without irreverence, more the offspring of narrow prejudice, illiberal jealousy and imperfect knowledge of the subject, than of any clear and well considered principles. These decisions have fluctuated in different directions at different periods; and the final results, unfavorable to the admiralty, have been in a great measure owing to the deference for the learning of Lord COKE, whose hostility to the admiralty, not to speak of his disingenuousness, entitle him to very little respect in such a discussion."

While our courts are following England, and departing from the maritime doctrine of liens as it prevails on the continent of Europe, and, indeed, in all commercial countries but England, the latter may yet find it desirable to grow in harmony with other nations.

§ 530. **Tendency in England Towards the General Maritime Law.** That English views of the general maritime law, with reference to contracts of affreightment, the limitation of the ship owners' liability, and kindred subjects, are tending towards the continental doctrine, may be surmised, if not inferred, from a comparatively recent utterance of Sir Robert PHILLIMORE, presiding in the High Court of Admiralty: "I have been much pressed by counsel for the plaintiffs to pronounce that the decision in *Lloyd v. Gilbert*, (Law Rep. I. Q. B. 115,) is not binding on the admiralty court, and also that that judgment errs in ascribing to the admiralty court the doctrine that the general maritime law is not a universal maritime law, binding upon all nations in a time of peace, but a law which is to be derived from the practice and decisions of English tribunals. * * * I should have hesitated a long while before I assented to the position that there was not a general maritime law, which, according to the comity of nations, was administered in the English as well as in the foreign courts of admiralty." Then, after citing, with approval, decisions of Lords STOWELL and TENTERDEN, affirmatory of a general maritime law binding upon

England, in circumstances stated by them, he adds: "I should have referred to the judgment of STORY, *De Lovio v. Boit*, as to the ancient laws, customs and usages of the sea, and have considered whether there was not a general maritime law founded upon them, and the recognized exposition of them wholly distinct from the common law of England," etc.¹

Presenting the law as it stands to-day in this country, under the decisions, we are obliged to say that the ship owner's lien for freight, on the merchandise carried by him, depends upon possession. It is true that many of the decisions to this effect assert unqualifiedly that the lien is *maritime*, but the adjective does not seem to be used in its legal sense. It is employed, in several of those decisions, merely in its ordinary signification as the equivalent of *marine*. Judge TANEY explains that the lien is "maritime" but not in the civil law sense, in the above quoted case of *The Bags of Linseed*.

§ 531. **Modifications by Agreement.** There are exceptions, however, to the ruling that possession is necessary, since the lien may be preserved without it, if the parties so contract. The decision of STORY that a stipulation for the payment of freight ten days after the return of the vessel, was not necessarily inconsistent with the lien,² would probably be still respected by the courts.

On the other hand, it must be mentioned that it has been held that the lien does not exist when the cargo is to be delivered before the time fixed for the payment of the freight.³

If it is true that delivery of goods, before the collection of the freight, dislodges the previously existing lien, upon an ordinary contract of affreightment, evidenced by a bill of lading without any modification of the usual form, still, any one who receives goods from a vessel under such bill of lading, would at least in a personal action be liable for the freight.⁴ Whether

¹ The *Patria*, 3 (Admiralty and Ecclesiastical) Law Rep. 461-2, (1871,) citing *The Gratitude*, 3 Rob. 240: Stowell, J., and *Simonds v. White*, 2 B. & C. 405: Tenterden, J.

² The *Volunteer*, 1 Sumner, 550; *Logs of Mahogany*, 2 Sumner, 589;

Brig Nestor, 1 Id. 73.

³ *Chandler v. Belden*, 18 Johns. 157. But, see *Pinney v. Wells*, 10 Conn. 104; *Raitt v. Mitchell*, 4 Camp. 149. Angell on Carriers, § 386 et seq.

⁴ *Phila.*, etc., R. R. Co. v. *Barnard*, 3 Ben. 39.

he is the owner of the goods or not; whether he has been dismissed as the consignee-agent by the owners or not, the ship looks to the bill of lading, and may lawfully deliver to him, unless legally notified to the contrary or otherwise lawfully prohibited. It is to the cargo that the captain looks for his freight, since "merchandise is bound for its own transportation;"¹ and therefore, he collects of the person to whom the goods are consigned.

The ship has a lien on the cargo for demurrage² also.

The lien for freight, (and demurrage may be included in this remark,) is not affected by the indebtedness of the captain, on his own account, to the consignees; that is, the consignees cannot refuse to pay the captain for the transportation of their goods because they have a counter-claim against him as a set-off; for the lien is against the cargo and in favor of the ship and her owners.³

§ 532. **When Charterers are Deemed Owners.** Most suits for freight being personal actions against consignees, we need not dwell longer on this side of the contract of affreightment, but will turn to liens against ships and the actions against ships upon such contract.

This lien cannot depend upon possession, since the freighter never has possession of the ship prior to the seizure for the purpose of vindicating his lien.

Proceedings against ships, under the contract, are brought by

¹ Webb v. Anderson, Taney, 504.

² Without stipulation, there is a maritime lien upon the cargo for demurrage: *The Hyperion's Cargo*, 2 Low. 93; 213 Tons Coal, 7 Ben. 15; *Donaldson v. McDowell*, 1 Holmes, 290. But not when the delay was the captain's fault: *Elwell v. Skiddy*, 15 N. Y. (Sup. Ct.) 73. See *Lake v. Hurd*, 38 Conn. 536; *Morse v. Pesant*, 3 Abb. (N. Y. App.) 321. When it is the custom at the port of delivery for vessels to take their turn for unloading through an elevator, such waiting is implied in the contract of affreight-

ment: *The Glover*, 1 Brown Adm. 166. But the custom must be proved: *Fisher v. Abeel*, 66 Barb. 381. When, owing to an epidemic among horses, the consignees could not receive the cargo with the usual dispatch, the vessel was not entitled to demurrage: *Coombs v. Nolan*, 7 Ben. 301. But entitled when delay was caused by having to wait for her consignees to unload other vessels consigned to them: *Keen v. Audenreid*, 5 Ben. 535.

³ *Fox v. Holt*, 36 Conn. 558.

shippers or their transferees,¹ for non-delivery of cargo,² damages³ caused by reason of unseaworthiness,⁴ or any other fault of the ship or master. Such proceedings are instituted upon the bill of lading, as the contract of affreightment; and that instrument is always held to bind the ship with the maritime lien in all its force, though the correlative obligation of the merchandise has been held not thus bound, as we have seen.

The bill of lading, however, may be greatly modified, in various ways; and it has been interpreted, from time to time, with reference to the circumstances of the contract and the intent of the modifications, and with reference to the liability of ships and ship owners and captains.⁵ But the maritime lien against

¹ Bills of lading should be made to the order of the shippers, when so required: *The M. K. Rawley*, 2 Low. 447. They are held not negotiable paper, though transferable so as to pass title: *Balt. & O. R. R. Co. v. Wilkins*, 44 Md. 11; *Tinson v. Howard*, 57 Ga. 410; *Emery v. Irving Nat. Bank*, 25 Ohio State, 360; *Stollenwerck v. Thatcher*, 115 Mass. 224. See *McCants v. Wells*, 4 S. C. 381; *First Nat. B'k of Cairo v. Crocker*, 111 Mass. 163; *Newcomb v. Boston, etc., R. R. Co.*, 115 Mass. 230; *Alderman v. Eastern R. R. Co.*, Id. 233.

² The common carrier by water must land the cargo as well as transport it: *The Mary Washington*, Chase's Decisions, 125. But he is not bound to deliver goods to the consignee, if they have been attached by the sheriff: *The Lord*, Chase's Decisions, 527.

³ He is not liable to freighters for the grounding of his steamer in a river without any fault of his: *The Great Republic*, 2 Woods, 33. Nor for damage to cargo by rain, subsequent to putting it on the wharf after request by the consignee for delivery, and after the latter had hauled away part of it—the captain having cov-

ered the remainder with tarpaulins: *The Wild Hunter*, 2 Woods, 315.

⁴ If a vessel is not a common carrier, yet she impliedly is warranted seaworthy, if her captain enter into a contract of affreightment to carry goods upon her: *The Planter*, 2 Woods, 490. Warranty of seaworthiness includes a competent master and crew: *The Vincennes*, 3 Ware, 171. Warranty is always implied, in the bill of lading, as to general seaworthiness: *Wilson v. Griswold*, 9 Blatchf. 267.

⁵ Though there was express exemption of liability for leakage, breakage and stowage, in the bill of lading, yet, where the captain was deemed negligent, damage for leakage was recovered: *Nelson v. Nat. St. Ship Co.*, 7 Ben. 340. The bill of lading having understated the amount of the cargo, was yet held conclusive against the vessel upon her claim for the full freight upon the whole cargo: *Relyea v. New Haven Rolling Mill Co.*, 42 Conn. 579. Express exemption from responsibility for the carelessness, negligence, etc., of the master, pilot and mariners, does not imply such exemption for the fault of stevedores: *Zung v. Howland*, 5 Daly,

the ship is always recognized and enforced as being implied by the contract evidenced by an ordinary bill of lading. A waiver of such lien must be expressed.¹ Without such express waiver, the lien necessarily exists; and it follows the vessel everywhere, even when she goes into the possession of the United States government, and may still be enforced against her by the ordinary methods.²

§ 533. **Contracts of Affreightment on Inland Waters.** For a voyage merely across a river navigable from the sea, a contract of affreightment has been held maritime and enforceable *in rem*.³ So is a contract with a steamer for carrying express freight from one town to another;⁴ and even when the convey-

(N. Y.) 136. When weights are not stated in the bill of lading, the ship is entitled to freight on the weight delivered—not that stated in the invoice: *Lot of Dry Hides*, 6 Ben. 200. There was express exemption of breakage, in the bill of lading, yet damage for the breakage of four mill-stones was awarded because there were two others unaccounted for: *Carey v. Atkins*, 6 Ben. 562. The phrase “in good order and well conditioned,” usual in bills of lading, does not imply knowledge on the part of the vessel or captain of the internal condition of boxes, casks, etc.: *The California*, 2 Sawyer, 12; *Forbes v. Dallett*, 9 Phil. (Pa.) 515. It has been held that the bill of lading may be supplemented, as a contract, by further receipts for freight given by the captain: *The Star of Hope*, 2 Sawyer, 15. The marginal marks have been held of no obligation: *Horrell v. Parish*, 26 La. Ann. 6. The vessel was held not liable for the breakage of stoneware, caused by the dangers of the sea, since such dangers were mentioned as exceptions in the bill of lading, though there was no express exception of breakage: 1,200 Pipes, 5 Ben. 402. See *Star of Hope*,

17 Wall. 651; *Bissell v. Campbell*, 54 N. Y. 353; *The Ethel*, 5 Ben. 154; *The Antoinetta C.*, Id. 564. To bind the owners for loss of cargo, the master must have authority to make the contract for transporting it: *Naylor v. Baltzell*, Taney, 55. And their liability, when not personally in fault, is limited to the ship and freight: Id. For damage only partly caused by the master's fault, the ship was held for the whole when the other cause was not explained: *The Mary Belle Roberts*, 2 Sawyer, 1. Whether damage is attributable to the “perils of the seas” is, of course, a matter of evidence: *The Compta*, 4 Sawyer, 375. So, also, where losses by fire are excepted in the bill of lading or contract: *Grey v. Mobile Trade Co.*, 55 Ala. 387; *Heyl v. Inman Steamship Co.*, 21 N. Y. (Sup. Ct.) 564. But where liability for theft was excepted, it was held not to include theft by the purser: *Spinette v. Atlas Steamship Co.*, Id. 100.

¹ *The Gate City*, 5 Biss. 200.

² *Revenue Cutter No. 1*, 1 Brown Adm. 76.

³ *The Flash*, Abb. Admr. 67.

⁴ *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344.

ance is partly by canal.¹ Many actions *in rem* against ships and steamboats are based upon the contract of charter-party;² but those actions require no special remark; and a general presentation of the subject of charter-party would be too extensive for this treatise.

One who has made advances on a bill of lading may look to the property, embraced in the bill, for payment;³ and the contract of affreightment, made in any State by the consignor of goods delivered for carriage, is valid in another State, and binds the consignee.⁴

¹ *Montieth v. Kirkpatrick*, 3 Blatchf. 279.

² The charterer in possession is *pro hac vice* the owner: *Wilkinson v. Dalferes*, 27 La. Ann. 379; *First Nat. Bank of Marquette v. Stewart*, 26 Mich. 83; *Leary v. United States*, 14 Wall. 607. There is no inconsistency in a contract requiring the charterer to keep the vessel in repair at the expense of the owner, and also stipulating for the return of the vessel in the order in which she was received: *Silliman v. United States*, 12 Court of Cl. 433. (See *Id.* 101 U. S. 465.) See *Field v. United States*, 12 Ct. of Cl., 355; *Morgan v. United States*, 14 Wall. 531, and *Propeller Co. v. United States*, 14 Wall. 670, as to the right of the government to reduce charter rates, and as to war and marine risks under charter-party. Also *Talbot v. United States*, 7 Ct. of Cl. 417; *Goodwin v. United States*, 6 Id. 146; *Flushing-Ferry Co. v. United States*, *Id.* 1. Agents, who were part owners, chartered a vessel to their creditor in payment of their debt: the charter-party was void as to the vessel and the other owners: *The A. M. Bliss*, 2 Low, 103. Hire cannot be recovered for a steamer unseaworthy: *Werk v. Leathers*, 1 Woods, 271. The government was held not responsible for the loss of a chartered steamboat, when the pos-

session and command of the boat remained with the owner: *Shaw v. United States*, 9 Ct. of Cl. 388, affirmed 93 United States, 235, 241. Nor is the government liable for the services of a chartered vessel while undergoing repairs, if the owners have contracted to keep her in good condition: *White v. United States*, 11 Ct. of Cl. 578. But see *Steele v. Buck*, 61 Ill. 343; *Merrill v. Arey*, 3 Ware, 215. A vessel was chartered to convey a cargo to a fleet at a distant port, but could not execute the contract because of a change in the military operations of the fleet: it was held that the owner of the vessel was not entitled to the charter money: *The Harriman*, 9 Wall. 161. The charterer of a vessel takes all the risks as to delay from unforeseen circumstances: *Esseltyne v. Elmore*, 7 Bissell, 69.

³ *First National Bank of Toledo v. Shaw*, 61 N. Y. 283; *First Nat. B'k of Cin. v. Kelly*, 57 N. Y. 34; *Marine B'k of Chic. v. Wright*, 48 N. Y. 1; *Cayuga Co. Nat. B'k v. Daniels*, 47 N. Y. 631; *B'k of Rochester v. Jones*, 4 N. Y. 497; *Baily v. Hudson R. R. Co.*, 49 N. Y. 70; *Dows v. Greene*, 24 N. Y. 638; *Lickbarron v. Mason*, 2 T. R. 63.

⁴ *Robinson v. Merchants' Despatch*, 45 Iowa, 470.

CHAPTER LI.

DEBT UNDER THE REVENUE AND NAVIGATION LAWS.

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§ 534. **Action in Rem Lies to Recover Penalties Under the Revenue Laws.** In the revenue and the navigation laws there are several provisions for enforcing liens by proceedings *in rem*. Such liens are ordinarily coeval with the indebtedness, but it seems that there are exceptions.¹

"Whenever a vessel, or the owner or master of a vessel, has become subject to a penalty for a violation of the revenue laws of the United States, such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily by libel to recover such penalty."²

By this section, penalties become property debts, and the action *in rem* lies. By compliance with the requirements of Sec. 2981, the owner of a vessel or the consignee who has a lien upon forfeited merchandise for freight for bringing it from a foreign country, is protected and paid without intervening in the proceedings for the condemnation of the merchandise. But, where the action of the government is against the merchandise *as an indebted thing*, under Sec. 3088, there could not possibly be any adjudication of surplus proceeds for freight, without

¹ Lien in favor of the United States held to date from seizure to recover penalty for violation of Sec. 2 Act 1838, (5 Stat. 304,) and Sec. 1,

Act 1852, (10 Id. 61); *The Ranier*, Dedy's R. 438.

² U. S. Rev. Stat. 3088.

evidence. It would seem that, in such case, there should be intervention.

§ 535. **Examples of Penalties as Liens Against Vessels.** Among the penalties thus enforceable *in rem*, (against the vessel,) the following illustrations may be given:

1. For departing from the port of arrival before having made a report or entry, four hundred dollars.¹

2. For omitting to procure a certificate, etc., five hundred dollars.²

3. For failure to have a correct manifest, the penalty is one-half the value of the omitted merchandise.³

4. For omitting to produce manifest and deliver copies, not exceeding five hundred dollars.⁴

5. For illegal departure, five hundred dollars.⁵

6. For not delivering manifest at certain ports specified, etc., one hundred dollars.⁶

7. For unlading without a permit, \$1,000.⁷

8. For unlawful transfer, the penalty is three times the value of the goods transferred.⁸

9. For unlawful delivery, four hundred dollars.⁹

10. For not furnishing provisions and accommodations to inspectors under given circumstances, one hundred dollars.¹⁰

11. For not having reported goods on board, under given circumstances, five hundred dollars.¹¹

¹ U. S. Rev. Stat. § 2773; *The Apollon*, 9 Wheat. 362; *Le Tigre*, 3 Wash. C. C. Rep. 572; *United States v. Bearse*, 4 Mason, 192; 95 Bales of Paper, 1 Paine, 149.

² U. S. Rev. Stat. § 2784.

³ *Id.* § 2809; *United States v. 26 Diamond Rings*, 1 Sprague, 294; *United States v. 10,000 Cigars*, 2 Curt. 436; *The Str. Missouri*, 3 Ben. 508.

⁴ Rev. Stat. § 2814; *The Antiles*, 8 Ben. 9.

⁵ *Id.* § 2828.

⁶ *Id.* § 2829.

⁷ *Id.* § 2867; *Schr. Industry*, 1 Gal. 114; *Sch. Harmony*, *Id.* 123; *Schr.*

Betsey, 1 Mason, 354; *The Virgin*, *Peters' C. C.* 7; *The Brant*, *Id.* 14.

⁸ U. S. Rev. Stat. § 2868.

⁹ U. S. Rev. Stat. § 2873; *The Gertrude*, 3 Story, 68; *The Hunter*, *Pet. C. C.* 10; *The Schr. Industry*, 1 Gal. 114; *The Schr. Harmony*, *Id.* 123; *The Schr. Betsey*, 1 Mason, 354; *Locke v. United States*, 7 Cr. 339; *Harford v. United States*, 8 Cr. 109; *United States v. Burnham*, 1 Mason, 57; *Bottomly v. United States*, 1 Story, 135; *United States v. Hayward*, 2 Gal. 486; *Jackson v. United States*, 4 Mason, 186; *Walsh v. United States*, 3 Wood. and M. 341.

¹⁰ Rev. Stat. § 2878.

¹¹ *Id.* §§ 2887, 2893.

12. For relanding goods entered for drawback, besides the criminal proceedings authorized, it is provided that, "in case of seizure, the same proceedings shall be had as in the case of merchandise imported contrary to law."¹

13. For obstructing officers in lawfully going on ship board, etc., the penalty is from fifty to five hundred dollars.²

14. For breaking locks, fastenings, etc., or landing goods clandestinely, five hundred dollars.³

15. For concealing goods liable to seizure, etc., the penalty is from fifty to five thousand dollars, and criminal proceedings are authorized.

The foregoing fifteen illustrations are not meant to include penalties to which other persons than "the owner or master of a vessel" have become subject, for Sec. 3088 does not create a lien against vessels for the acts and omissions of any but owners and masters.

§ 536. **Penalties in Commerce with Contiguous Countries.** In the 11th chapter of the 34th Title of the Statutes, on the topic, "Commerce with Contiguous Countries," the penalties are mostly fines to be recovered upon personal conviction of the offenders. And, when such criminal proceedings are not required, the action to recover the penalty would be a civil and personal one against the offender, and not a proceeding *in rem* against any vessel or goods to collect a sum of money, unless the person liable should be the owner or master of a vessel, who has become liable by the instrumentality of the vessel, so as to bring his case under the rule of Sec. 3088, or of a similar article of the 11th chapter of the statutes, to which attention is now called.

It is enacted in the 3125th section of the Revised Statutes, that if the master of any enrolled or licensed vessel shall neglect or fail to comply with any of the provisions or requirements of the nine preceding sections, such master shall forfeit and pay to the United States the sum of twenty dollars for each failure or neglect, and that the vessel shall be liable and may be sum-

¹ Rev. Stat. § 3049.

³ Rev. Stat. § 3070.

² Id. § 3068.

marily proceeded against, by way of libel, in any District Court of the United States. The action *in rem* lies, therefore, against the vessel for the master's not presenting duplicate sworn manifests when departing from a port of a collection district to a port in another, (canal boats navigating canals within the United States, excepted,)¹ for his failure to enter, upon his original manifest, cargo taken on board or discharged at any intermediate port in the United States, destined for an American port, and failure to deliver such entry, duly sworn, to the collector where the unloading of the cargo is completed, within twenty-four hours after arrival;² for not filing his sworn manifest and obtaining a clearance before departing from a port in one collection district to a place in another where there is no custom house, and delivering manifest and clearance to the proper custom-house officer at the port at which the vessel next arrives after leaving the place of destination specified in the clearance;³ for unloading cargo in the night without special license, taken from any United States port on the northern, northeastern or northwestern frontiers, to another United States frontier port;⁴ (and for this violation of law the penalty is from one to five hundred dollars, though for the other violations, it is twenty dollars each, as provided in Sec. 3125;) for discharging cargo, or landing passengers or baggage, from any foreign port without having obtained a permit and otherwise complying with law;⁵ for not delivering a manifest, subscribed and sworn, of his cargo, (if he have any,) when arriving at a custom house from a port where there was none, within twenty-four hours of arrival;⁶ but steam-tugs, duly enrolled and licensed for foreign and frontier trade, are excepted from the duty of clearing and reporting at the custom house, unless they are employed in towing rafts or vessels without sail or steam.⁷

§ 537. **Liens and Action in Rem Under the Internal Revenue Laws.** Congress has made the law that a lien shall rest upon all a man's property, to the amount of the internal revenue

¹ U. S. Rev. Stat. § 3116.

² Id. § 3117.

³ Id. § 3118.

⁴ Id. § 3120.

⁵ Id. § 3121.

⁶ Id. § 3122.

⁷ Id. § 3123.

tax and the interest, costs and penalties thereunto added, if he, being "liable to pay any tax, neglects or refuses to pay the same, after demand." The lien shall rest upon all his property for his refusal to pay the tax on any part of it. The lien is in favor of the United States.¹

Whether Congress can constitutionally charge one *res* with the debts of another *res*, so as to be able to proceed *in rem* against X.'s one farm for the tax with lien due by X.'s other farm, (the question does not sufficiently afford two sides for interesting debate,) it is certain that an action to enforce the lien must be against an *indebted thing*, since it is to collect a sum of money. If neglecting or refusing to pay the tax were made an offense imputable to the thing on which the tax rests, the action would be against a *guilty thing*, and for its forfeiture. Even then, only the thing connected with the offense of neglect or refusal could be proceeded against, since the United States would have no *jus in re* to vindicate against property not liable for such offense, nor subject to such refusal or neglect on the part of the owner. But the action is not for forfeiture; it is to enforce a *lien*. Do the United States have any *jus ad rem* against that part of the delinquent's estate upon which no taxes are due?²

If this article, creating a lien where there is no indebtedness, is to be passed without comment, the following four or five sections, which provide for the procedure in vindication of the lien, should be noticed and commended for their novelty and directness. No doubt Congress evinced wisdom in avoiding the courts; for, had it required proceedings *in rem* to enforce a lien upon "all property and rights of property belonging to such person," (*i. e.*, the person who should refuse to pay the internal revenue tax upon one piece of his property) the courts might have asked, of the libellants, "Where is your *jus ad rem*?"

¹ Rev. Stat. U. S., § 3186.

² R. S., § 3186. Demand held necessary to create the lien and make it operative: *United States v. The Pacific Railroad*, 4 Dil. 71: Miller, J.

And it attaches only to such property as is owned by the delinquent at the date of demand: *United States v. Pacific R. R. et al.*, 1 McCrary, 1: McCrary, J.

Distrain is of old usage, as well as of recent endorsement.¹ Distrain and sale constitute the method prescribed in many articles² of the Revised Statutes, but this royal road cannot be justly traveled where there is no right *in* or *to* the thing sought.

§ 538. **Further Provisions.** There are other provisions, looking to the courts, for "the prompt collection of all revenues and debts due and accruing to the United States" under the internal revenue laws; and judgments for taxes and penalties "shall be paid to collectors as internal taxes are required to be paid;"³ and in section 3213, it is plainly written: "All suits for fines, penalties and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, *in any proper form of action, or by any appropriate form of proceeding, qui tam*, or otherwise, before any circuit or district court of the United States, for the district within which said fine, penalty or forfeiture may have been incurred, or before any other court of competent jurisdiction; and taxes may be sued for and recovered in the name of the United States, *in any proper form of action*, before any circuit or district court of the United States for the district within which the liability to such tax is incurred, or where the party, from whom such tax is due, resides at the time of the commencement of the said action."⁴

A liquor dealer or rectifier of distilled spirits incurs a penalty of a thousand dollars for buying or receiving more than twenty gallons of such spirits, except from another rectifier or wholesale dealer.⁵ Both the seller and buyer would probably be held violators and therefore liable.

The rectifier or wholesale dealer, for violation of any of the requirements concerning the keeping of books, etc.,⁶ incurs a penalty of one hundred dollars besides subjecting himself to a

¹ Springer v. United States, (12 Otto,) 102 U. S. 586.

² Rev. Stat., §§ 3187-8-9; 3217; 3624-5-6-7-8-9; 3629, 3630.

³ Rev. Stat., §§ 3215, 3216.

⁴ Rev. Stat. U. S., § 3213.

⁵ § 3319; N. Y. Rec. Co. v. United States, 14 Blatchf. 93.

⁶ § 3318; United States v. Malone, 8 Ben. 574; A Quantity of Distilled Spirits, 3 Ben. 552.

heavy fine, and to imprisonment. These, and other penalties, by general provisions, create liens enforceable *in rem*.¹

§ 539. **Penalties for Offenses Against Commerce.** "All the penalties and forfeitures which may be incurred for offenses against this title, [Tit. 48: COMMERCE AND NAVIGATION,] may be sued for, prosecuted and recovered in such court, and be disposed of in such manner, as any penalties and forfeitures which may be incurred for offenses against the laws relating to the collection of duties, except when otherwise expressly prescribed."²

For not giving up the old registry of a vessel, when a new one has been granted, the owner forfeits five hundred dollars.³

For omitting required lights, a sailing vessel incurs the forfeiture of two hundred dollars, and may be "seized and proceeded against by way of libel in any district court,"⁴ etc.

For many faults and omissions, connected with the conveyance and comforts of passengers, the master and owner of the vessel become liable to sums collectable at any port at which the vessel may arrive,⁵ as repeatedly asserted; and finally, it is provided: "The amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels *shall be liens on the vessels* violating those provisions, and such vessel shall be libelled therefor,"⁶ etc. And these provisions are further extended by section 4274.

The owner's liability cannot follow him personally beyond his interest in the vessel and freight.⁷

§ 540. **Liens and Actions in rem Under the Navigation Laws.** Under Tit. xlix., Revised Statutes, for the "Regulation of Vessels in Foreign Commerce," two penalties may be in-

¹ For failure to make returns for taxation under § 122 of the act of June 30, 1864, (13 U. S. Stat. 284,) but one penalty is recoverable before suit. *United States v. Erie R. R. Co.*, 9 Ben. 67; *United States v. The Guaranty, etc., Co.*, 8 Ben. 269.

² R. Stat. U., S. § 4305.

³ Id., § 4169.

⁴ Id., § 4234.

⁵ Tit. xlviii., Chap. 6, Rev. Stat. U. S.

⁶ Id., § 4270.

⁷ Id., § 4283; *Steamship Co. v. Mount*, S. Court U. S. 1881. (not yet reported.) *Lord v. Godall, etc.*, *Steamship Co.*, 4 Sawyer, 292; *Norwich Co. v. Wright*, 13 Wall. 104; *The Atlas*, 3 Otto, 93 U. S. 302

curred by the ship's master: *First*—For departing from the United States to some foreign port not American, without a passport, the master of a United States vessel is liable in the sum of two hundred dollars; and, *Second*—For failure to deposit the necessary papers with the United States Consul, five hundred dollars; but there is no provision, in this title, creating a lien upon the ship to be enforced directly against her.

The next title, L., teems with penalties, and closes with the requirement that they "shall be recovered by civil action in the name of the United States,"¹ without specifying whether they shall be *in rem* or *in personam*, except that in one given case of *lien*, it is prescribed in the last section, that it shall be enforced by "petition," to be followed by "suitable process for the enforcement of such lien:" which is something like that which the courts sometimes dubiously speak of as "a proceeding in the nature of a proceeding *in rem*."

§ 541. **Penalties, Liens and Actions Peculiar to Steam Navigation.** For carrying a greater number of passengers than is stated in the certificate of inspection, the master or owner of a steamer is liable to the amount of the passage money and ten dollars for each passenger in excess, recoverable by any person suing for it;² and there is a lien upon the vessel for the amount.³ By this proposition, any man choosing to bring the action would, upon his own election, thus become a lien holder by instituting a suit against the vessel, and establishing the fact of such excess.

A lien also rests upon the vessel of the master who fails to keep a list of his passengers, to the amount of a hundred dollars.⁴

Cotton and hemp are liable to five dollars per bale, if carried on passenger steamers without compliance with section 4472 of the Revised Statutes, and shall be liable to seizure and sale therefor;⁵ though, as a matter of course, such bales must be judicially found to have become thus indebted, after the seizure and before the sale.

¹ Rev. Stat. U. S., Id. §§ 4389, 4390.

² Rev. Stat. U. S., § 4465.

³ Id., § 4469.

⁴ Id., §§ 4468-9.

⁵ Id., § 4473.

Various other penalties are prescribed in Title, lii., for the Regulation of Steam Vessels, some of them to follow criminal convictions, and others recoverable only by personal civil actions, but the title closes with this general provision: "If any vessel, propelled in whole or in part by steam, be navigated without complying with the terms of this title, the owner shall be liable to the United States in a penalty of five hundred dollars for each offense, one-half for the use of the informer, for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense.¹ The penalty for the violation of any provision of this title not otherwise specially provided for, shall be a fine of five hundred dollars."²

The above quotation is the last two articles of the title; and, construed together, they seem to give choice of action *in rem* or *in personam*. Of course the fine mentioned has reference to personal prosecution of an offender, and it applies to all violations of the title not specially provided for; and as the provisions of the first part of our quotation are general rather than special, the last clause would seem to cover all violations except those previously disposed of as to both the penalty and the method of its enforcement. But, since article 4499 is so comprehensive as to cover any non-compliance with the terms of the whole title, and since it prescribes the seizure and libel of the vessel to recover of her, as an indebted thing, the like amount of five hundred dollars for each offense, we conclude that there is choice of action given, if indeed, both remedies may not be pursued, simultaneously or successively. This double action might find its exemplar in the prosecution of the smuggler for conviction of crime, and the smuggled goods for forfeiture, were it not for the difference between things indebted and things guilty. With regard to the former, if the debt is paid by the owner, (upon compulsion or otherwise,) there remains no debt against the ship; consequently, no lien—

¹ Id., § 4499.

² Id., § 4500.

no *jus ad rem*: therefore, the double action is juridically impossible.¹

' R. S., §§ 3296, 5440. A person was indicted and convicted for violation of § 5440 by removing distilled spirits, and sentenced to two years' imprisonment and \$10,000 fine, but was pardoned. Then he was sued

for the penalty denounced by § 3296 for their removal. Held, that both the former conviction and the pardon were bars to the suit: *United States v. McKee*, 4 Dil. 128.

CHAPTER LII.

STATE LIENS ENFORCED IN ADMIRALTY.

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§ 542. **Enforcement of Maritime Liens Created Under State Statutes.** State liens, as we have seen, are enforceable by the direct action *in rem*, in cases at law in the State courts, and in the United States courts, whenever that remedy is authorized by statute; and always enforceable, by way of intervention, in actions *in rem*, by virtue of the general law governing the system, which will not (except to enemies,) deny an appearance after the notice to all persons having any interest in the thing seized, inviting them to come and assert it in order that all rights *in* or *to* the *res* may be adjudicated, with the view to create the new title paramount.

State liens are also always enforceable *in rem* in admiralty, (except in prize causes,) by way of intervention; but not by direct action except where they are held to be maritime liens.

While indebted things can be seized and libelled in admiralty only in vindication of a maritime lien, yet, (since it is necessary to the *actio in rem* that there shall be an invitation given to all persons having rights—either *jura in rebus* or *jura ad res*—to assert them,) such indebted things may not only be claimed by owners, but may also have liens not maritime vindicated against them by way of intervention.

Although the Court of Admiralty can marshal the proceeds of a condemned *res* only between lien-holders and owners,¹ yet

¹ The Edith, (4 Otto,) 94 U. S. 523.

the former are not limited to holders of maritime liens as such liens have been defined by the courts. What are maritime liens? Were the question an open one, we should hold the view that all liens upon ships or other marine property are, in fact, maritime liens, however they may have originated; and that the necessities of commerce, as well as the requirements of legal science, would warrant their designation as such, in law. But since the courts have not so held, we shall find it convenient to divide State liens enforceable in admiralty into two classes: *maritime* and *ordinary*.

A good illustration of the former is found in the liens created by State law in favor of material men furnishing supplies or repairs to a domestic ship in her home port. It is well settled that such liens, though created by State legislatures, are maritime and directly enforceable by seizure and libel of the thing upon which they rest. When a change of the twelfth Admiralty rule had created the necessity, many of the State legislatures enacted laws giving such material men lien on the domestic ships supplied or repaired by them in the home port; and the courts have, where the State law has been complied with by those men, (as, for instance, where the lien has been recorded when required by the statute,) promptly recognized it as a maritime one, entitled to its high rank, and enforceable by direct action, or by way of intervention when the seizure has been made by some other holders of a maritime lien.¹

Where by State statute a lien is given for building a ship, the admiralty court will sometimes enforce it against the ship,² and always against admiralty remnants.

¹ Vide, Chapter on Repairs and Supplies to Vessels, etc., and authorities cited there. Also, *Peyroux v. Howard*, 7 Pet. 324; *The S. G. Owens*, 1 Wallace Jr. 358; *The Albatross*, 2 Id. 327; *Str. Ellen Stewart*, 5 McLean, C. C. 269; *The Ferax*, 12 Law Rep. 183; *The Thos. Scattergood*, Gilpin, 7; *The Sam Slick*, 18 Law Rep. 162; *The John Walls, jr.*, 12 Id. 24.

² *Phillips v. Wright*, 5 Sandf. 342;

The Steamboat Joseph E. Coffee, Alcott Ad. 401; *Nicholas v. May*, Wright, 660; *The Calisto*, Daveis, 29; *Read v. The Hull of a New Brig*, 1 Story, 244; *The Hull of a New Ship*, Daveis, 199; *The Young Mechanic*, 2 Curtis C. C. 404; *The Kearse*, Id. 421; *Purinton v. The Hull of a New Ship*, Id. 416; *Sewall v. The Hull of a New Ship*, 2 Ware, 203; *Davis v. A New Brig*, Gilpin, 473; *The Richard Buxted*, 25 Law

The rank of liens, enforceable in admiralty, directly or by way of intervention, has been discussed with reference to State legislation, etc.¹

Liens may be waived;² but what amounts to a waiver cannot be reduced to an invariable rule.

§ 543. **Interventions on Ordinary State Statute Liens.** A good illustration of the ordinary statute lien enforceable in admiralty is found in the custom-house mortgage. The mortgagee cannot seize and libel the mortgaged vessel, in admiralty, but he has a lien which he may vindicate by way of intervention, when the vessel has been rightfully arrested by some holder of a maritime lien. The doctrine of the courts is that such ordinary lien holder may come in for any surplus of proceeds that may remain, after the maritime liens have been satisfied, and before the balance of fund in the registry shall be paid over to the latest owner of the condemned *res*. Such surplus proceeds are called "admiralty remnants."³

The forty-third Admiralty rule allows "any person having an interest in the proceeds in the registry of the court, by petition and summary proceeding, to intervene *pro interesse suo*, for a delivery of them to him;" and further prescribes that "upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree thereon according to law and justice."

As to the right and the method, Mr. Justice BRADLEY,⁴ after remarking, "The court has power to distribute surplus proceeds. to all those who can show a *vested interest* therein, in the order of their several priorities, no matter how their claims originated;" and "it is a wholesome jurisdiction very commonly exercised by nearly all superior courts, to distribute a fund, rightfully in its possession, to those who are *legally entitled* to

Rep. 601. But, see to the contrary, The Sch. Coernine, 21 Law Rep. 343; The Revenue Cutter, 21 Law Rep. 281.

¹ The Melita, 3 Hughes, 494; The Sea Witch, 3 Woods, 75; The Katie, 3 Woods, 182; The Bradish Johnson, 3 Woods, 555; The Hiawatha, 5 Saw.

160; The E. M. McChesney, 15 Blatchf. 183.

² The Napoleon, 7 Biss. 393; The Lumberman, 3 Hughes, 542; The Active, Olcott, 287.

³ The McChesney, 15 Blatchf. 183.

⁴ The Lottawanna, 21 Wall. 582.

it, and there is no sound reason why admiralty courts should not do the same," adds: "In this case, the appellants themselves have no maritime lien, but merely a mortgage to secure an ordinary debt not founded on a maritime contract. They, therefore, have no standing in court, except under the forty-third rule, and in the manner there indicated. Their libel was inadmissible, even under the admiralty rule as recently modified. But, before the final decree, they filed a petition for the surplus proceeds; and, as there is no question in the case about fraudulent preferences under the bankrupt law, they are entitled to those proceeds towards satisfaction of their mortgage."

Mr. Justice CLIFFORD, dissenting, said the court had no jurisdiction over the mortgage. The better view seems to be that, (conceding the custom-house mortgage on a steamboat to be not a maritime lien,) the admiralty court would have had no jurisdiction, had the mortgagees been the seizing libellants, and not respondents to notice.¹ Mr. Justice NELSON, in delivering the decision in *The Ship Angelique*, distinctly expressed the doctrine that a custom-house mortgage could not be directly enforced by libel but might be paid out of proceeds; and he cited *The John Jay* in support of the first part of the proposition, to which may now be added *The Lottawanna*.

§ 544. "Admiralty Remnants;" and the Forty-third Admiralty Rule. Recurring to the opinion of the court in the last case quoted above; and now considering it with reference to the method of vindicating an ordinary State lien under the forty-third rule, the reader will note the peculiarity claimed for the intervention on such lien.

Neither the rule's author, nor its quoted expounder, understood this method to be that of intervention in the usual way. The ordinary lien holder intervenes *pro interesse suo*, and "after due notice to the adverse parties *if any*," the court shall proceed summarily to hear and decide, etc.

Is there to be a second notice? The first must necessarily have been given to all persons, or the cause could not have pro-

¹ The *John Jay*, 17 How. 399; The *Ship Angelique*, 19 How. 239; The *Sailer Prince*, 1 Benedict, 461; The *Don Thorpe*, 2 W. Rob. 73; The *Neptune*, 3 Haggard, 132.

ceeded thus far. Is the second notice, (in order to be "due notice to the adverse parties,") a general advertisement to the world, like the first? If the first is insufficient, so as to create a necessity for the second, how can there be any legal proceeding under the first? If it is sufficient, it must bring into court "all persons having or pretending to have any interest *in or to* the thing," or result in making them pronounced defaulters.

"If any," adverse parties must have due notice; but how shall it ever, in any case, be known prior to notice, whether there are any adverse parties—the first notice being disregarded?

The court said, in the quotation above, that the custom-house mortgagees had no standing in court, except under the forty-third rule, and by filing an application for the surplus proceeds. The idea is that they could not appear as intervenors in response to the notice and monition, and try their cause contradictorily with other intervenors: and this seems to be also the idea of the author of the rule.

That rule seems to need emendation. It needs it none the less because of its emanation from the hand of a very distinguished jurist. It should not cut off the ordinary lien holder's right to respond to notice in time to contest the maritime character of liens preferred by intervenors who are allowed to appear in the first instance. Why, in this very case of the Lottawanna, we have an example of the importance of allowing the ordinary lien holder to combat the pretensions of intervenors alleging a maritime *jus ad rem*. The holders of the custom-house lien did successfully contest the lien of the material men. Had they been obliged to fold their arms supinely till the latter had, unopposed, absorbed the whole proceeds after the payment of the seamen libellants, they might have come into court too late to get anything, under the rule, and under the decision that they had "no standing in court, except under the forty-third rule, and in the manner above indicated;" and that "their libel," (*i. e.*, their cross-libel or intervention,) was "inadmissible even under the admiralty rule as recently modified;" and that their only method of vindicating their *jus ad rem* was by filing a petition for the surplus proceeds. To preserve the rights of

lien holders of the lowest rank to contest those of the highest, the rule ought to be amended.

§ 545. **Proceeding Contradictorily.** What right had even the seamen libellants, (appearing to vindicate a maritime lien of very high rank,) to judgment against the steamboat, without proceeding contradictorily with all appearers who had responded to invitation and avoided default? The validity of the decree in their favor was dependent upon the validity of the notice to all persons, and upon a trial with all the world as well as against the *res*.

What is the significance of the special "due notice to the adverse parties, if any," unless it implies that the first notice under which holders of maritime liens may appear is insufficient to cite "all persons having or pretending to have *any* right, title or interest *in* or *to* the property libelled," to appear and assert their interests?

Chief Justice MARSHALL said: "It is a principal of natural justice of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him."¹

Mr. Justice STORY said: "If a seizure is made and condemnation is passed without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making defense, the sentence is not so much a judicial sentence as an arbitrary edict." And further: "If it does not appear from the face of the record of the proceedings *in rem* that due notice, by some public proclamation, or by some notification or monition, acting *in rem* or attaching to the thing, so that parties in interest may appear and make defense, and, in point of fact, the sentence of condemnation has passed upon *ex parte* statement without their appearance, it is not a judicial sentence conclusive upon the rights of foreigners;"² and he might have included those of citizens.

Any other *jus ad rem* existing under a State law, or under a law of the United States, is entitled to enforcement against that

¹ The Mary, 9 Cr. 126.

² Bradstreet v. The Neptune Ins. Co., 3 Sumner, 607. Vide, ante, Book

i., chap. vii., "NOTICE," and cases cited therein.

upon which it rests, just as is the custom-house mortgage lien. We have used the latter by way of illustration for all non-maritime liens.

All such ordinary liens rank below maritime liens in the admiralty court. Though holders of the former have an interest in contesting the latter, and in putting the evidence of them to the test, yet they cannot enforce their rights till all the latter, if established by proof, have been satisfied.

Manifestly no mere ordinary creditor of the owner of the *res* can intervene in the action *in rem* in admiralty, (as indeed he could not in a case *in rem* at law,) for the reason that he has no *jus ad rem*.

§ 546. **Law or Admiralty Jurisdiction?** It is sometimes difficult to decide whether a lien partakes of the maritime character, and whether action upon it should be instituted in admiralty or at law. Without recurring to cases concerning repairs and supplies to vessels in home ports, sufficient illustration of the nicety of questions, arising in practice, may be drawn from decisions in other causes. While a State statute lien for building a ship has been usually held vindicable only at law, the common-law lien of a shipwright, who retained possession of the vessel he had built, has been enforced in admiralty.¹ The navigation of a raft of logs, on navigable waters, has been held not to create an admiralty lien;² but it has also been held that such a raft, rescued when found floating upon navigable waters, was subject to admiralty process to enforce the salvor's lien.³ Yet the raising of a submerged "floating dock," in navigable waters, was not deemed a salvage service.⁴ While the vindication of an alleged lien for general average was denied, it was intimated that, had the libellants held possession of the *res*, there would have been a common-law lien, and that it would have been enforceable in admiralty.⁵ Whether there is a mari-

¹ The B. F. Woolsey, 7 Fed. Rep'r, 108; The Marion, 1 Story, 68.

² A Raft of Logs, 9 Chic. Leg. News, 26. See A Cypress Raft, 2 Woods, 214.

³ Fifty Thousand Feet of Timber,

2 Low. 64; The Rock Island Bridge, 6 Wall. 216.

⁴ Salvor Wrecking Co. v. Sectional Dock Co., 3 Central Law Journal, 640.

⁵ The Mazurka, 2 Curt. C. C. 77

time lien or not, and therefore whether the jurisdiction is in admiralty or at law, seems to have been differently held in cases where there was a breach of charter-party concerning goods which were never put upon a ship.¹

Under State statutes, the question of the maritime character of a lien is often very nice. Actions under such statutes, for damages because of tort on navigable waters, resulting in death, have been maintained in admiralty, and have also been maintained at law.² Tolls imposed upon vessels by State statute, have been held of maritime character, where the lien was expressly authorized;³ and, under State pilotage laws, the maritime lien has been held to exist in the absence of expression;⁴ and it has been held that the maritime lien may be created by implication.⁵

Claims presented for light money; for hire of anchors, cables, boats, sails, etc.; for quarantine expenses; for labor in cutting through ice; for scraping the ship's bottom; for labor of stevedores; for various services, if rendered upon the credit of a ship or steamboat, come properly under admiralty jurisdiction, by way of intervention at least—certainly come under such jurisdiction when urged against remnants.

¹ *Oakes v. Richardson*, 2 Low. 173; *The Asa Eldridge*, 8 Fed. Rep'r 720.

² Ante, chap. xlix., and cases there cited; *The Garland*, 5 Fed. Rep'r, 924; *In Re Long Island*, etc., Trans. Co., Id. 607; *The Catsop Chief*, 8 Id. 163; *The Sylvan Glen*, 9 Id. 335.

³ *The St. Joseph*, 10 Chic. Leg. News, 269.

⁴ *The California*, 1 Saw. 463; *The Glencame*, 7 Fed. Rep'r, 604.

⁵ *The America*, 1 Low. 176; *The Geo. T. Kemp*, 2 Low. 485; *The Guiding Star*, 9 Fed. Rep'r. 521.

CHAPTER LIII.

THE ACT OF CONGRESS TO PROTECT LIENS BY AUTHORIZING INTERVENTIONS IN CASES UNDER THE INSURRECTION LAWS.

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§ 547. **The Statute of Congress Allowing Lien Holders to Intervene.** Authority is expressly given by Congress, to mortgagees and all lien holders to assert their claims against *Things Indebted* when those things are proceeded against as hostile, provided they bring themselves within the act authorizing such intervention; and jurisdiction is, by statute, conferred upon the United States courts, to enforce liens and foreclose mortgages against such property. Whenever hostile property is indebted, and is seized for confiscation as hostile, the indebtedness may be sued upon by way of intervention between the libellant and the *res*, by the mortgagee or other lien holder or privileged creditor. While such property, as to the government, is *hostile*, it is, as to the creditor, *indebted* property. The hostility, in such case, has reference to the sovereign: the indebtedness, to the creditor. It is in place to consider interventions to enforce

liens against hostile property, here in this book devoted to Indebted Things.

The statute by which lien holders are allowed to intervene in confiscation proceedings, and by which United States District Courts have original jurisdiction to adjudicate such interventions and to foreclose mortgages,¹ applies to all three of the confiscation acts: that of July 13, 1861,² with its amendment of May 20, 1862;³ that of August 6, 1861;⁴ and that of July 17, 1862,⁵ with its "Resolution Explanatory" of the same date.⁶ All of these confiscation statutes concern enemy property; and Congress, to protect liens and mortgages resting upon such hostile property, authorized, by the act of 1863, above cited, the creditor to assert against such *indebted-hostile* things, his *jus ad rem*, and expressly gave him rank above the government, since it is enacted that "the court rendering judgment of condemnation shall, notwithstanding such condemnation, and before awarding such ship, vessel or *other property*, or the proceeds thereof, to the United States or to any informer, *first provide* for the payment, out of the proceeds of such ship, vessel or other property, of any *bona fide* claims which shall be filed by any loyal citizen of the United States, or of any foreign State or power at peace and amity with the United States, intervening in such proceeding, and which shall be established by evidence as a valid claim against such ship, vessel or other property, under the laws of the United States or of any loyal State thereof."⁷ And it is further provided that claimants who have illegally used such property shall be not allowed to intervene—and that claims must be such as might have been specifically enforced: *i. e.*, they must not be ordinary personal debts, but property debts, such as liens or mortgages.

§ 548. **Jurisdiction Confined to United States Courts to Foreclose Mortgages, Etc., Against Confiscated Property.** Jurisdiction is conferred by this statute, upon the, Federal courts to

¹ U. S. Rev. Stat. § 5322; U. S. Stat. at L., vol. xii., p. 762.

² 12 Stat. at L., p. 256.

³ Id., 404.

⁴ Id., 319.

⁵ Id., 589.

⁶ Id., 627.

⁷ R. Stat. U. S., § 5322; 12 Stat. at L., 762.

foreclose mortgages and enforce liens against confiscated property; and the jurisdiction is confined to them.

What court is meant by the phrase, "the court rendering judgment of condemnation?" The answer is found in the confiscation statutes above cited, as follows:

(1.) "Proceedings on seizures for forfeitures under this act may be pursued in the courts of the United States in any district into which the property so seized may be taken and proceedings instituted; and such courts shall have and entertain as full jurisdiction over the same as if the seizure was made in that district."¹

(2.) "Such prizes and capture shall be condemned in the District or Circuit Court of the United States, having jurisdiction of the amount, or in admiralty, etc."²

(3.) "To secure the condemnation and sale of any of such property, after the same shall have been seized, etc., proceedings *in rem* shall be instituted in the name of the United States, in any District Court thereof, or in any territorial courts, or in the United States District Court for the District of Columbia, etc. And the several courts aforesaid shall have power to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshals thereof where real estate shall be the subject of sale, as shall fitly and efficiently effect the purposes of this act and vest in the purchasers of such property, good and valid titles, thereto."³

The first two of these three acts were recited in the title of the act expressly conferring jurisdiction on the courts mentioned,⁴ but before the adoption of the statute, it was made general so as to cover all cases in which property is confiscated, perhaps rightly including naval prizes; though we have heretofore seen that the Supreme Court has made an exception of them, in the application of this extended jurisdiction.⁵

¹ Sec. 9 of Non-Intercourse Act of 1861, 12 Stat. at L. 258.

² Sec. 2 of Confiscation Act of 1861, 12 Stat. at L. 319. Vide, ante, §§ 334, 335.

³ Secs. 7 and 8 of the Confiscation Act of 1862, 12 S. at L. 591.

⁴ Note, 12 S. at L. 762.

⁵ Ante, § 317; Case of *The Sallie Magee*, 3 Wall. 451; *The Hampton*, 5 Wall. 375.

The United States District Courts have original jurisdiction, it is seen, under all three of the confiscation acts; they are therefore unquestionably clothed with jurisdiction, by the act of 1863, above cited, to foreclose mortgages and enforce liens against confiscated property so as to make the lien or mortgage creditor to *prime* or outrank the government when libellant, so as to be allowed not only to intervene, but to obtain payment in preference to the government, though the entire *res* be exhausted in the effort. The jurisdiction is most positively conferred: "the court rendering judgment of condemnation, *shall*" first provide for the payment of claims of intervenors which might have been specifically enforced had there been no seizure by the government.

§ 549. **Reason of the Statute.** With this positive legislative command before us, we need not inquire the reason of it; still such inquiry may throw additional light upon this distinct and plenary conference of new jurisdiction. Heretofore, when proceedings against hostile things were confined to naval prizes, interventions have not generally been allowed; and even the holders of bottomry bonds have not been permitted to come into courts of nations to intervene between the capturing belligerent and the thing seized and proceeded against. The same rule might have been followed by the courts in proceedings against enemy property seized on land, had not Congress thought proper to allow loyal lien holders to intervene, to the end that justice might be done them, and to the further end that the United States might not have the name of having ever covered into the treasury the price of land while the mortgages resting upon it should remain unsatisfied and the mortgagee, or other lien holder, cut off from all legal remedy.

Without the conferring of such jurisdiction upon the courts having the power to declare property confiscate, Congress could not have had the liens and mortgages cleared from the property of enemies, since State courts could not be resorted to for such foreclosures while the property should be under seizure in the custody of the Federal courts. Besides, during the trying times when those statutes were enacted, all State courts could not be depended upon. However, had all been trustworthy, it

would have been awkward beyond practicability for the condemnation to have been in the Federal courts by proceedings *in rem*, while the foreclosures of mortgages and the enforcements of liens were in a different jurisdiction. The *res* could not be in both courts at the same time.

As to the use of a court of nations for the enforcement of a State-law lien or mortgage, that is no more anomalous than the intervention in admiralty courts for the proceeds by persons having claims over which the admiralty ordinarily has no jurisdiction.

The mixed jurisdiction which Federal district courts exercise over "admiralty remnants" in the registry, is quite as anomalous as that of exercising jurisdiction over enemy property under the *jus gentium*, and over State liens resting on such property under the authorization of Congress for enforcement of State law, at the same time.

The convenience of such exercise of jurisdiction is doubtless one of the main reasons why Congress conferred it. It is incomparably better to let lien holders respond to notice and be allowed to intervene when hostile property is proceeded against, (as they always are when guilty property is seized and prosecuted,) than to relegate them to Congress to dance attendance from session to session, to get it to pay out of the treasury, to legal claimants, the amount of the mortgage debts that may have honestly rested on the condemned property before its price had been taken by the government.

Whatever the reason for the conferring of the jurisdiction upon the Federal courts to foreclose State mortgages and enforce State liens against hostile property, there stands the statute, clear and unambiguous, saying the courts shall do it. Not only one statute, but two: for the quotation we have above made from the seventh and eighth sections of the confiscation act of 1862, also confers the jurisdiction, so far as condemnations under that particular act are concerned; for how could the court "have power" to "make such orders" and to establish such forms of decree" as shall "fitly and efficiently," "vest in the purchasers" of "real estate," "good and valid titles," unless it also had power to clear off all encumbrances and to

order the cancelling of all recorded liens and mortgages? One of two things had to be: either the court must have been clothed with power over such liens and mortgages, or the innocent lien holders must lose their debts forever, since they could not assert them against the new title arising from forfeiture, after general notice, default and final decree of condemnation.

§ 550. **Extent of the New Jurisdiction.** The extent of this jurisdiction of the national courts, thus conferred by statute of Congress over mortgages and all other specific liens of loyal citizens and friendly strangers, is measured by the extent of the liens and mortgages themselves. If the mortgage covers the fee simple of land, the court's jurisdiction to foreclose it is as broad. If the lien embraces the whole value of a ship, the court's jurisdiction is as extensive. The land may be condemned to the United States—the ship may be also—but before awarding the proceeds or the property to the libellant, the mortgagee or other lien holder must be paid, if it takes every dollar.

It has sometimes been questioned whether the confiscation act of 1862 gives the courts jurisdiction over the fee simple title of land, (though no question has been raised, in this regard, with respect to the two older confiscation acts,)¹ but here is a good test: if a mortgage *in fee* rests upon land condemned under the act of 1862, has the court jurisdiction to foreclose it? Assuredly so, by the statute which says the court *shall* enforce all specific liens, etc.: consequently, the jurisdiction is over the *res in fee*. For to say that the court could only condemn the life estate of the enemy who holds in fee, yet could allow an intervenor to foreclose against the fee, is to say something untenable.

How can it be possible for a court to have jurisdiction to “provide for the payment, out of the proceeds,” of confiscated property, of liens or mortgages covering the whole value of the property, in the absence of jurisdiction over the property itself in its entirety?

¹ Except in *Jones v. Buckell*, ante § 338.

What would be the result, if there is no jurisdiction over real estate except as to the possession of it during the life of a given enemy? The mortgagee's *jus ad rem* underlies the *fee*: the condemnation is only for the life; the proceeds prove insufficient to satisfy the mortgage; must he foreclose again in a State court in order to exercise his constitutional right to get what is his own? Or shall we say that, in such case, "he ought not to be allowed to intervene?" If he ought not, what shall we do with the statute which says that he ought? And if we respect the statute, he ought to be allowed to assert his entire claim on whatever that entire claim rests upon. And the courts have had jurisdiction conferred upon them to adjudicate that entire claim. It is sure, then, that the condemnation must be that of the entire thing hypothecated, even if we had not the positive words of the confiscation act itself to assure us.

If it be urged that while the confiscation act of 1862 reaches the fee, yet the "Resolution Explanatory" amends it in that respect, we answer that the act of 1863 is latest of the three and may be said to amend or supersede the "Explanatory Resolution" itself—though we cannot see the necessity.

It seems inadmissible for any one to deny the jurisdiction over the interventions of lien holders, so plainly conferred by a law of Congress, by invoking an ambiguous congressional explanation of an anterior law.

§ 551. **Interventions of Lien Holders for Taxes, Etc.** Interventions of lien holders, other than mortgagees, against confiscated property, will next be considered. And there is no better case with which to illustrate this entire class of intervenors, than that of a State or city government intervening to collect taxes on real estate seized for confiscation. It was the common practice for the State tax collector, the city tax collector, and the county collector, to appear in response to the notice given to all persons to come forward and assert their claims, to intervene upon their liens, where the confiscations during the war of the rebellion were being pressed. Such intervenors were always allowed to intervene; and they were always paid out of the proceeds before anything was covered

into the treasury. The records of "The Confiscation Cases"¹ that went before the Supreme Court of the United States, from Louisiana, showed that the State of Louisiana, by its attorney general, and the city of New Orleans, by its city attorney, had both intervened in those cases for taxes and had had their claims allowed. There had been no question raised as to their right: so the Supreme Court, which affirmed the judgment in favor of these lien-holding intervenors, cannot be said to have had the matter of their rightfulness under consideration.

Taxes bear upon land in fee simple, as a matter of course. The State, city, parish or county has a *jus ad rem*: and the thing in which it has the right is not less than the whole thing. The tax lien upon land is a *jus ad rem* to the amount of the tax debt, resting on the complete title—not limited to a usufruct of the land for years. The jurisdiction conferred upon the United States District Courts, as we have seen, gives them power to hear and determine interventions based upon liens that may be specifically enforced ordinarily in State Courts, provided the intervenors be loyal, and the States so also, and provided further, that the intervenor has not knowingly participated in the illegal use of the property seized as the *res*. It would be novel, indeed, could we find a case where the tax creditor has illegally used land on which his lien rests. And that taxes are susceptible of being specifically enforced, under State law, no one will dispute. For taxes are emphatically property debts.

In the cases mentioned, styled in the reports, "The Confiscation Cases: Slidell's Land and Conrad's Lots," the taxes had accrued to a considerable sum, as may be seen in the records of those cases, on file in the clerk's office of the United States Supreme Court. There are instances in which the tax liens, accumulating for years, cover the entire value of the property. Let us reason upon such a case. The land, being condemned, cannot be awarded to the United States, nor can its proceeds be so awarded, till the intervenors for taxes have been paid, though it take the whole price of the land. In such case, the sale enures wholly to the benefit of the intervenors.

¹ Slidell's Land and Conrad's Lots, 20 Wall. 92, 115.

§ 552. **Effect upon Tax Creditor if his Lien is not Enforced upon Land held in Fee.** What would be the effect, if, after the enemy owner has, by the decree of condemnation, been wholly divested of his property, so that "there is nothing left in him," the United States, as libellant, should be allowed to sell only the use of the land for a term of years—(it might be an uncertain term of years, and therefore of little worth,)—and to retain the *fee* to be given by donation or grant to the heirs of the enemy owner? What would be the effect upon the tax creditor's claim? He would fail to have it satisfied, of course. If his *jus ad rem*, as we have supposed, would require the whole proceeds of the land *in fee* upon which it rests, he would be cut off from his rights under the statute; much more, he would be cut off from his vested rights under the Constitution of the United States. Such a result is repugnant to the judicial sense. Indeed, it would be an infringement of the statute, if any Federal judge should award the land to the United States, either as owners or *negotiorum gestores* for the heirs of the former owner, before such *lien* holders have been paid to the amount of the whole value of the land *in fee*, if the whole should be necessary to satisfy the claim.

Let the reader bear in mind that the doctrine first promulgated in the case of *Bigelow v. Forrest*¹ has been set aside; that the case has been cited for the purpose by the Supreme Court, and the correction made that they certainly had not intended to say that the District Court of the United States had exceeded its jurisdiction by condemning more than the life estate of French Forrest; that the complete title of confiscated property vests in the United States. This is fully held in *Wallach v. Van Riswick*² and *Pike v. Wassel*,³ and *French v. Wade*,⁴ heretofore repeatedly cited. Notwithstanding the remarks about the purchaser, made in these cases, the *fee* is held to be lodged in the United States for some purpose. Now it may be confidently said that that *fee* must pay the taxes due the intervenors; that the court must sell it for that purpose; that the court can-

¹ 9 Wall. 339.

² 92 U. S. 202.

³ 94 Id. 711.

⁴ 102 Id. 132.

not award to the libellants either the fee or the proceeds or anything whatever, for them to take in any capacity whatever, as owners, as trustees, as *negotiorum gestores*, so long as the intervenor's lien-claims for taxes remain unsatisfied; and it is submitted that this conclusion is inevitable.

§ 553. **The Land is the Tax Debtor.** From the moment of the rendition of the decree of condemnation, who or what is the tax debtor? It is the land, of course, just as before; but who stands sponsor for the land as an indebted thing? He who takes the former owner's position. The United States take that position. They must pay the taxes so far as the land is sufficient for the purpose. The statute requires that the land be sold and the proceeds so applied. Now, for whose benefit must the land be sold? The lien creditors; the tax intervenors.

Before the seizure by the United States, the State or the city could have seized and sold for taxes. After the seizure, the State and city could not do so. After the condemnation, since they still could not sell, the United States were bound to sell for them.

"The creditor whose pledge is seized and offered for sale at the suit of another creditor, would not have the right to oppose that sale and to preserve his pledge in kind. His right is that of being paid out of the proceeds."¹

"The proceeds stood in the place of the real estate, and the same preference was retained on it."²

It follows, as a corollary, that if the court must sell that which owes the taxes, the purchaser buys precisely that. He buys of him who stands in the shoes of the former owner as tax debtor, so far as the land is capable of paying it. If the State had sold to him, (by judicial sale, after judgment,) the land for taxes, would the purchaser receive less than the land bought at the tax sale? He buys, after condemnation to the United States, precisely the same thing: the tax-owing real estate.

What an anomaly it would be, if the operation of the con-

¹ *Alexander v. Jacob*, 5 Martin, (La. R.) 634.

² *Crum v. Laidlaw*, 10 Martin, (La. R.) 468; *Chiapella v. Launsse*, Id. 448.

fiscation act of 1862, and its "Joint Resolution Explanatory," and the act of 1863 giving lien holders the preference and conferring jurisdiction on the Federal courts to hear and determine their interventions and sell condemned property to satisfy them, the tax creditor should be deprived of his hold on the land, and have his lien shifted to a life interest in that land, so that only such life interest could be conveyed to the purchaser at the tax sale!

§ 554. **Interventions by Holders of Mortgage Liens.** Mortgage foreclosures in confiscation proceedings must now claim attention.

As mortgage liens may be specifically enforced, there can be no question that they are included in the act "To Protect Liens on Vessels and other Property,"¹ and power is conferred on the Federal courts to foreclose them, when the mortgagees intervene in confiscation proceedings; and that they outrank the United States, *jus in re* to hostile property, and must be satisfied in preference. As the United States, when libellants of hostile property, claim the thing itself; they are not creditors at all; and therefore, it is not strictly accurate language to say that the mortgagee intervenor must be paid in preference; but the better expression of the idea is found in the statute itself: "The court rendering judgment of condemnation shall * * * before awarding such * * * property or the proceeds thereof to the United States * * * first provide for the payment out of the proceeds * * * of any *bona fide* claims which shall be filed by any loyal citizen * * * intervening in such proceeding," etc., on claims which "might have been enforced specifically against such * * * property in any loyal State wherein such claim arose."

This clearly includes mortgages; and intervenors upon them ought to be allowed to intervene, if we mean to obey this statute of Congress.

As the mortgagee's rank is superior to that of the United States government, it must be satisfied to the full capacity of the property mortgaged.²

¹ U. S. Rev. Stat., § 5322; 12 Stat. at L. 762.

² United States v. Hawkins, 4 Mar-

tin's New Series, (La. Rep.) 317; Thelussen v. Smith, 2 Wheat. 426; Parsons v. Welles, 17 Mass. 425.

So soon as the mortgagee intervenor has established his *jus ad rem* and obtained judgment against the *res* libelled by the United States, he is placed in the position of a judgment creditor who cannot sell, but must let the seizing libellants sell for him. The sale is a duty of the libellants, though it should inure wholly to the benefit of the intervenor. The judgment in favor of the intervenor, with privilege on the mortgaged property, goes to the bottom of that property; and the jurisdiction, conferred by the statute upon the court, makes it obligatory upon the judge to order the sale of that thing on which the mortgage rests, and not any less than that thing; he must sell as instructed by the statute, and for the benefit of the lienholding intervenors first, and the government secondarily.

§ 554. **The Mortgagee cannot Sell; the Government must Sell for him.** The intervening mortgagee can neither sell nor prevent the sale. It has been held again and again—time out of mind—that “one holding a prior mortgage cannot prevent the sale of the mortgaged property at the suit of a subsequent mortgagee. He must exercise his right on the proceeds.”¹ And the United States, in such case, are bound to sell the real estate *in fee* where the mortgage is *in fee*, since they cannot sell to pay a *part* of the mortgage debt, when the mortgage was given to secure the whole, and when the United States stand in the shoes of the mortgagor *quoad* the whole property and the whole debt, except that they are not bound beyond the proceeds of the sale.²

For “each and every portion of the property mortgaged is liable for each and every portion of the mortgage debt. The mortgage is *tota in toto, et tota in qualibet parte*. Civil Code, 3367; Code of Practice, 73.”³ The reference by the court is

¹ Conrad v. Prieur, 5 Rob. (La. R.) 55; Tyler v. His Creditors, 9 Id. 373; Florence v. Orleans Nav. Co., 1 Rob. (La. R.) 224; La. Code of Practice, articles 401, 402, 403; Herbert's Heirs v. Babin, 6 New Series, Martin, (La. Rep.) 614; Casson v. Louis St. Bank, 7 Id. 281; Joice v. Poydras de la Lande, 6 La. 283; Fulton v. Fulton, 7 Rob. (La.) 73; City Bank of N. O.

v. McIntyre, 8 Id. 467; Bloodworth v. Hunter, 9 Id. 256; Rowley v. Kemp. 2 La. Ann. 360.

² Pepper v. Dunlap, 16 La. Rep. 163, 169; Moore v. Allain, 10 La. 496; Florence v. Orleans Nav. Co., 1 Rob. (La.) 224; Elwyn v. Jackson, 14 La. 411; Adams v. Sears, 3 La. Ann. 144.

³ Bagley v. Tate, 10 Rob. (La.) 45.

to the old codes: see corresponding articles in the revised codes.

"The claim of the mortgagee is a *jus ad rem*, not *jus in re*. He does not claim as owner of the property. The possession of the mortgagor is not adverse, but under the mortgage. * * * Acts cannot be alleged in a court of equity, as an adverse possession, which will defeat the lien of the creditor * * * such as "converting to one's own use the property of another. A chancellor will not permit a party to plead his own fraud to defeat the equity of the claimant."¹ Thus the United States, which succeed to the position of the mortgagor upon the condemnation of his property to them, cannot set up their proceedings as adverse to the intervening mortgagee, since they hold under the mortgage and cannot defeat his lien by converting the mortgaged property to their own use, with the lien unsatisfied. It is equally clear that they cannot convert it to the use of others—such as the heirs of the enemy mortgagor, with the lien left unsatisfied.

§ 556. **Payment of Lien Holder a Condition Precedent.** When such property is sold under judicial order, the payment of the prior creditor is the condition precedent—the *sine qua non* of the sale. Indeed, the act of Congress conferring upon holders of mortgages, etc., which could be specifically enforced under the State law, the right of foreclosing by way of intervention in confiscation cases, and providing that they should be paid before awarding the property or its proceeds to the government, fully gives them the remedy of the hypothecary action. "The hypothecary action," say the Supreme Court of Louisiana, "is a proceeding *in rem*, and the third possessor must pay the debt or give up the property."² And the payment must be that of the whole debt to the full capacity of the thing mortgaged. Again they say of this action, "It is a *real* action, whether the property mortgaged is in the hands of the mortgagor or of a third person."³ And the government is a third person with reference to the mortgagee, whenever the mortgaged property has been forfeited to the government.

¹ Bank of La. v. Stafford, 12 How. 341.

² Moore v. Allain, 10 La. Rep. 496.

³ Elwyn v. Jackson, 14 La. R. 411.

Courts of the United States, sitting in a State and passing upon real estate there situated, are governed by the *lex rei sitæ*.¹ The laws of Louisiana are not peculiar on the subject of protecting liens. There is not a State in the Union which allows lien holders to be ousted of their vested rights by the change of property from hand to hand.

§ 557. **Interventions Allowed Against Land Titles in Fee.** Under the authorization of the "Act to Protect Liens," etc., there have been many interventions by persons holding mortgages *in fee* upon the property seized for confiscation under the act of 1862. Judgments have generally followed, and the property has been sold to satisfy such liens; but, as the heirs of the enemy owners have acquiesced in seeing their fathers' property go to satisfy just debts, those cases have not reached the Supreme Court. They can only be consulted in the clerks' offices of the courts where they were decided. We shall, however, find allusion to them convenient for illustration.

In several instances, the mortgage covered the entire value of the property mortgaged. In such case, the mortgage creditor, having judgment rendered in his favor, with rank judicially recognized in the judgment as superior to that of the United States, (as the act of Congress requires) became the sole beneficiary of the sale, though the sale had to be made by the government as the seizing party. Responding to the monition, by appearing within the legal delay, the mortgagees were before the court, with their mortgages asserted, before the date of the judgment of condemnation; and their own judgment and recognition of rank, antedated the issuance of the writ of sale.

The United States, succeeding to the position of the mortgagor, had the property sold, and the proceeds applied as required by law; that is to say, they had the tax and mortgage creditors first paid, as the act of 1863 required, and the surplus, if any, paid into the treasury of the United States to be used for the support of the army, as the act of 1862 required. It

¹ United States v. Crosby, 7 Cr. 115; Clark v. Graham, 6 Wheat. 579; Kerr v. Moon, 9 Wheat. 570; Curtis v. Hutson, 14 Vesey, 541; Whart. Conflict

of Laws, sec. 273; Story's Conf. of Laws, sec. 424; Woolsey's Int. Law, sec. 71; 2 Burge on Col. and For. Laws, chap. ix., 841.

may be remarked, in passing, that in such cases the condemned property could not have been retained, under the act of 1865, for freedmen and refugees, since the duty of selling to pay the lien-holding intervenors was imperative.

As the judgments for taxes, and in favor of intervenors upon their mortgages, were always rendered before the writs of sale were issued; and as those judgments were with privilege *priming* that of the United States—or, rather, (since the latter were not creditors at all, but owners,) as those judgments were with privilege which necessarily had to be satisfied out of the property to its exhaustion, before the new owners could exercise any rights of ownership, either for themselves or for others, those judgments had to be effectuated by sale of the land with title *in fee*. They could be effectuated in no other way. The tax liens were *in fee*; the mortgage was *in fee*; the importation of judgment in the authentic act of mortgage bore on the title *in fee*; the title had been libelled *in fee* and so condemned. All the fee simple right, title and interest that had been in the enemy-mortgagor, was taken out of him; “nothing was left in him;” all that he had had, became vested in the United States coupled with the duty of paying the mortgage and tax judgments as far as the property was capable of so doing.

§ 558. **Could the Fee have been Reserved?** Under these circumstances, could the United States have merely sold the use of such land for such time as the mortgagor might live, and reserve the thing itself—the fee simple of the land—to be transferred thereafter to his heirs, at the expense of the mortgagee and the tax creditors? Could they have defeated the judgment creditors, with the preference given both by State law and by the statute of Congress, by selling but a small part of the condemned *res*, and donating the rest to persons who could not inherit it from the mortgagor who had enjoyed already the full price, who had borrowed that price when he made the mortgage, who had been judicially divested of the indebted thing, and who had “nothing left in him” that he could devise or convey?

If we take the standpoint of the mortgagee, or of the tax creditors, we may easily see that such a course would have been in fraud of those intervenors, and in derogation of their statute

and constitutional rights. If we take the standpoint of the legislator, we see that such a limited sale and limited payment would have been in direct violation of the act to protect liens, above discussed; we shall see that the *lex rei sitæ* would have been set at naught. If we sit with the court which condemned such property; and, at the same time, decreed that the lien holders be first paid, we shall see that the libellants, (were they private litigants,) would have been in contempt, had they held onto the land for any purpose that would defeat the decree—even the purpose of handing it over to heirs that they might have the land after their father had enjoyed its price.

What would any one of these judgment creditors have done, had only the life estate been sold, and an attempt made to confine him to the proceeds of that? He would have enjoined the libellants—had they been not artificial and sovereign—to issue an *alias* writ of sale, that he might get to the bottom of that upon which his *jus ad rem* rested. He would have seen to it, that his rights, as judgment creditor, were not limited to the price of the usufruct of land for an uncertain period not possibly exceeding a few years.

But, as the title *in fee* of the land was condemned, and sold, and the proceeds distributed among the judgment creditors according to rank; as the act of 1862 and that of 1863, as well as the *lex rei sitæ* were regarded, he acquiesced, in every instance. The case was settled. The decree was final. None of the parties took any writ of error to the Circuit Court. Jurisdiction over the subject matter had been exhausted. No collateral attack was legally possible. What the government was obliged to sell, it sold. What it sold, the purchaser bought. What he bought was evidenced by the title given by the marshal to him and his heirs and assigns forever.

The effect of the sale and the payment of the proceeds to the judgment creditors, was to relieve the property of the weight of debt encumbering it. It relieved the mortgagor and his heirs from just so much obligation to pay money as the property title *in fee* could pay. The heirs cannot complain that the

creditors have obtained payment of admitted debts through judicial process obtained upon constructive notice.¹

The purchaser paid the mortgage and the taxes, to the full capacity of the land to pay; and "he who pays the mortgage to the full value of the land, is *subrogated by effect of law* to the full rights of the mortgagee."²

"A mortgage is a charge upon the land, and whatever would give the money will carry the estate in the land along with it for every purpose."³

Certainly, all the parties—the libellants—the mortgagees—the defaulted world—all acquiesced in the judgments. Certainly, no writ of error was taken, by any one, in any of these causes; and, the time for removing the cases to a higher court, in due course, having expired, and the right of removal being prescribed, no court on earth can henceforward have any jurisdiction to disturb these decrees.

By the statute, the District Court had plenary original jurisdiction over the subject matter of the actions *in rem*, and of the interventions; and, had there been error, either of fact or of law, all parties have acquiesced; and, had they not, errors could not have been corrected except by removal, by writ of error, to the appellate courts.

§ 559. **Heirs Cannot have both the Land and its Price.** If, upon the death of their father, his heirs could have instituted an action of ejectment against the purchaser of the property, they would have found it an indispensable preliminary to their suit, to return the money which had paid the mortgage that had rested upon their property. It would have been a necessary prerequisite to their action. They must tender the money to him who had paid the sum which extinguished the

¹ *McQuiddy v. Ware*, 20 Wall. 14.

² *Brobst v. Brock*, 10 Wall. 534; *Jackson v. Cowen*, 7 Cow. 13; *Johnson v. Robertson*, 34 Md. 165; *Fielder v. Varner*, 45 Ala. 429; La. Civil Code, Art. 2161, [2157;] *Candle v. Murphy*, 89 Ill. 352; *Fulkerson v. Brownlee*, 69 Mo. 371; *Hines v. Potts*, 56 Miss. 346; *Balt. & O. Ry. v. Trim-*

ble, 51 Md. 99; *Evarts v. Hyde*, 51 Vt. 183; *Coe v. Midland Ry. Co.*, 31 N. Y. Eq. 105.

³ *Martin v. Mowlin*, 2 Burr. 978; *Parsons v. Wells*, 17 Mass. 422; *Pothier's Du Droit de Domaine de Propriété*, vol. viii., chap. i., No. 1., p. 111.

mortgage debt, or deposit the amount in court for account of whom it might concern. Their father lost nothing, and they could not get the land free, without paying the mortgage, any more than he could have done so. He could not have the price and the land too, and his heirs could not. An exception to an action of ejectment by the heirs against the purchaser, based upon this ground, would prove fatal to their suit. This is well established law everywhere. From numerous decisions, a few may be cited without further comment.¹

§ 560. **Examples of Interventions not Within the Statute, Adjudged Against.** From the various cases in which there have been interventions on mortgages and other liens, pursuant to the notice given, and under authority of the statute of 1863, one may be selected for illustration, in which the interventions were defeated. Many of the cases have never been reported; but the one referred to is that of *The United States v. 844 Lots and Ten Squares of Ground*,² heretofore repeatedly cited, but for elucidation of other points.

Libelled as enemy property held by title *in fee*, in the United States District Court in New Orleans, the *res* was unqualifiedly condemned, pursuant to the prayer of the United States. Between the libellants and the thing seized, not only the tax-lien holders but three other claimants of proceeds intervened: the Citizens' Bank of Louisiana, the Merchants' Bank of New Orleans, and Marcuard, (a citizen of France,) all exhibiting

¹ *Elliott v. Labarre*, 3 La. 554; *Barrelli v. Gauche*, 24 La. Ann. 324; *Donaldson v. Rouzan*, 8 Martin (N. S.) 162, 181; *Andrews v. Ackerman*, Id. 205; *Gormley v. Palmes*, 13 La. Ann. 213; *Dearmond v. Courtney*, 12 La. Ann. 251; *Brown v. Bonny*, 30 La. Ann. 174; *Coulson v. Wells*, 21 La. Ann. 383; *Latham v. Hickey*, Id. 425; *Blake v. Nelson*, 29 La. Ann. 245, 255; *Beaver v. Slanker*, 94 Ill. 175; *Richerson v. Crawford*, 94 Ill. 165; *Gay v. Alter*, (12 Otto,) 102 U. S. 79; *Twombly v. Cassidy*, 82 N. Y. 155; *Stinson v. Anderson*, 96 Ill. 373; *Pratt v. Pratt*, 96 Ill. 184; *Risk v. Hoffman*,

69 Ind. 137; *Wood v. Smith*, 51 Iowa, 156; *Sands v. Lynham*, 27 Gratt. 304; *Hudgins v. Hudgins*, 6 Gratt. 320; *Volle's Heirs v. Fleming's Heirs*, 29 Mo. 152; *Shoyer v. Nickell*, 55 Mo. 269; *Evans v. Snyder*, 64 Mo. 516; *McLaughlin's adm'r v. Daniel*, 8 Dana. 182; *Bently v. Long*, 2 Strob. Eq. 43; *Howard v. North*, 5 Texas, 315; *Grant v. Lloyd*, 12 S. & Mar. 191; *Mocklee v. Gardner*, 2 Har. & G. 176, 177; *Petty v. Clarke*, 5 Pet. 481.

² "The Confiscation Cases," 20 Wall. 92.

mortgages, given by Slidell, upon the land, to secure money advances made to him. The exceptions to the interventions set up that the money had been advanced for the hostile purpose of maintaining Slidell as an ambassador of the enemy, the Confederate States so called, and that the intervenors had not brought themselves within the statute of March 3, 1863, authorizing lien holders to appear. The evidence sustaining the exceptions, all three of the interventions were dismissed. That they "ought not be allowed to intervene" the District Court held, (or rather, ought not be allowed to maintain their interventions,) on the grounds that the claims were not such *bona fide* ones as the statute requires; that they were not preferred by loyal citizens; that the purpose of the loan to Slidell was *contra bonos mores* and also unfriendly to the government of that belligerent under which the court sat; that the intervenors, as aiders and abettors of the enemy, had no standing in the forum which they sought to destroy. As to the French subject, his nationality raised no bar, since the statute authorizing and protecting liens expressly provided that a citizen of "any foreign state or power at peace and amity with the United States," should have the right to intervene.¹

The Supreme Court said of him and the other intervenors, "They ought not to have been allowed to intervene;" precisely what the District Court had held when the interventions were adjudged against, and precisely what the Circuit Court had held, when the dismissals were affirmed; in both the interventions were rejected and finally adjudged against; and the Supreme Court's decree as to the three interventions, was: "The action of the Circuit Court, in the premises, is therefore affirmed in each of the three cases."²

The decree against the intervenors was final: they were not dismissed as in case of non-suit. The Supreme Court made no emendation whatever to the decree of the Circuit Court, and the Circuit had made none to that of the District Court.

§ 561. **Reasons for Judgment.** But the reasons given in

¹ "An Act to Protect Liens," etc.,
12 Stat. at L. 762; Rev. Stat. § 5322.

² "The Confiscation Cases"—Slidell's Land—decisions on the interventions, 20 Wall. 115.

this decision have been supposed by some to go the length of the proposition that no interventions by lien holders should be allowed in any proceeding *in rem* under the confiscation act of 1862 and its congressional explanation. If so, the decree belies the reasons, for the logical result should have been to modify the dismissal so as to take its finality out of it. But we must, in all fairness, take the reasons as a whole; not confine ourselves to those given in the closing paragraph of the opinion in the Slidell land case, but construe that in connection with the body of the opinion. Thus construing, we find the court holding, (p. 105, 20th Wall.) that the land was rightly libelled and condemned as enemy property and that Slidell's ownership of it was an immaterial matter, provided that it had any enemy ownership whatever: a perfect neutralization of the remark of the concluding paragraph (p. 115.) that "it was only the right of John Slidell, whatever that was, that could be condemned and sold."

Again—Default of all persons not intervening is given its due importance, (p. 108,) in the body of the opinion, while, at the close, it is said that the intervenors would not have been affected by it had they made no appearance.

Again—Notice, as one of the essentials of a proceeding *in rem*, is treated with its rightful importance in the opinion, (p. 110,) yet at the close it is intimated that the lien holders might have treated it with contumacy without detriment to their claims.

Again—"Everything requisite to a common law [?] proceeding *in rem*, is found in the record," (p. 110,) yet, according to the closing paragraph, the *lien holders* would not have been concluded by the decree of condemnation along with all the rest of the defaulted world, had they made no appearance at all.

Again—"Having heard and considered evidence, it must be presumed that the court found that the property *belonged* to a person engaged in rebellion," (p. 112,) yet the court hint in the closing paragraph that it was uncertain whether the property *belonged* to such a person or not, and that the government had taken the chances of confiscating his "right," "whatever that

was," and that all persons having, or pretending to have, any right, title or interest in or to the *res* seized and proceeded against, had no business to respond to the notice.

Again—Even in the closing paragraph we are told that "the United States succeeded to the position of Slidell," which must mean that if Slidell had held the land in *fee simple*, the United States succeeded to that title; but we are immediately referred to *Bigelow v. Forrest* and *Day v. Micou* to show that only the life estate of the enemy had been confiscated.

Bigelow v. Forrest has been overruled, and the Supreme Court have said that they did not mean to hold that the United States court which had condemned Forrest's enemy property had exceeded its jurisdiction when it took all title out of him and vested it in the United States; and *Day v. Micou*, modelled upon the decision just mentioned, fell with it.¹

§ 562. **Erasure of Mortgages and Subsequent Foreclosure.** The plaintiff in error, Day, had purchased, in market overt, the condemned *res*, sold under *venditioni exponas*, issued in the case of "*The United States v. Two Squares of Ground*, property of J. P. Benjamin." The land had belonged to Benjamin *in fee*; it was libelled and condemned *in fee*; it was sold *in fee* and a *fee simple* title given to the purchaser, his heirs and assigns forever.

Pursuant to the provisions of statute, authorizing the District Courts to make all necessary orders to fully and efficiently vest in the purchasers good and valid titles, the court caused all recorded mortgages and liens to be erased from the books of the mortgage office, since all such lien holders had been decreed to be in contumacy and default for not responding to the notice, and forever concluded by the decree of condemnation.²

¹ Ante Chap. xxxviii., § 397.

² The order was as follows: On the 18th day of March, 1865, the court made and entered of record the following general order applicable to proceedings in confiscation cases: "On suggesting that the eighth section of the Act to Suppress Insurrection, etc., approved July 17,

1862, that the several courts aforesaid (the United States District Courts) shall have power to make such orders, establish such forms of decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshal thereof, where real estate shall be the subject of sale, as shall fully and

It is a sufficient comment to add that an inferior State court of Louisiana ejected Day long afterwards at the collateral suit of the defaulted mortgagee's heirs; that the Supreme Court of that State, upon appeal, and the Supreme Court of the United States, upon writ of error, affirmed the judgment. No more need be said here, since elsewhere the unauthoritativeness of this decision has been shown. Neither the Louisiana State courts nor the United States Supreme Court had any jurisdiction whatever to disturb the final decree of the United States District Court in the case of the *United States v. Two Squares of Ground*, the property of J. P. Benjamin, nor the sale and title thereunder.

Benjamin's being a British subject is no reason why his heirs should not get back his confiscated property at his death, if the heirs of any enemy can legally get it back: for the confiscation act of 1862 with its resolatory explanation, is not confined to citizen enemies. Had Benjamin been a foreigner when his land was confiscated, the libel and all the proceedings would have been just as they were when he was a domestic enemy. The act is against the property of "persons" belonging to designated classifications of official or agent enemies; and a "person" who had never owed allegiance to the government of the United States, and who would therefore have been incapable of treason, could have had his property confiscated for being an agent of the so-called confederacy, for negotiating rebel bonds abroad. For instance, Marcuard's mortgage rights might have been libelled and condemned for his aiding and abetting of an enemy ambassador, and for acting as a banking agent for the rebel government. How would the "Resolution Explanatory," (which the Supreme Court say is the same thing as the article of the Constitution on forfeiture for treason beyond the life,)

efficiently effect the purposes of this act, and vest in the purchasers of such property good and valid titles thereto, it is ordered that, in all cases where real estate is condemned and sold under the act aforesaid, the marshal shall cause all mortgages resting against the property sold to be

canceled, and shall attach the certificate of the recorder of mortgages to the deeds given to the purchaser, showing the cancellation of the same." Pursuant to this order, all liens of defaulted lien holders were canceled, as the records show, in each case.

have applied to such confiscation of a foreigner's property found in this country?

If heirs, after the sale of land to satisfy mortgage creditors intervening before sale, can ever get back the land, may not Benjamin's heirs do so, after the sale of his land by the defaulted mortgage creditor, Micou? If not, why not? The only difference between the rights of the two sets of heirs is that, in the first case the mortgages were foreclosed at the proper time, in compliance with the act of Congress, in the Federal court having exclusive original jurisdiction; while, in the second case, the heirs of Micou foreclosed too late, (being after confirmed default,) in a jurisdictionless State court. Both mortgages were *in fee*; both originally underreached the full property hypothecated: whence comes it that the title of the purchaser at the sale to satisfy Micou's mortgage is better than that of the purchaser at the sale to satisfy a rightfully foreclosed mortgage? Was it unlawful for intervenors to comply with the law in the confiscation proceedings? Was it lawful for Micou to condemn the law, and seek forfeited rights in a court without jurisdiction, after having been defaulted in the Federal court which had exclusive original jurisdiction?

It seems, therefore, that the cases cited to sustain the reasoning on Marcuard's claim, are unavailable, even if they had not been overruled by subsequent decisions, including the body of the opinion in the case in which that intervening claimant had appeared, and the affirmance therein of the decree *res adjudicata quoad omnes*.

Besides, the *dictum*, (the reasoning not applying to the affirmance of the decree respecting the interventions,) seems in conflict with the plain provisions of the statute authorizing interventions, and to the judicial interpretations of the statute, previously made;¹ and it has since been overruled.²

It is safe to say that a lien holder who brings himself within the statute, has the right to intervene and assert his claim; and that the courts, including that of the highest resort, will accord him the remedy.

¹ The Sallie Magee, 3 Wall. 451; The Hampton, 5 Id. 375.

² Semmes v. United States, 1 Otto. 21.

BOOK IV.

ACTIONS AGAINST THINGS INDEBTED.

PART II.

PROCEEDINGS WITH LIMITED NOTICE.

CHAPTER LIV.

PROBATE PROCEEDINGS IN REM.

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§ 563. **The Requisites if All are to be Concluded.** A probate proceeding, to be *in rem*, must possess all the characteristics and embrace all the requisites of that form of action. There must necessarily be a *res*, custody of the *res*, right to pro-

ceed against it, a competent forum, allegations equivalent to an information, notice to all interested, a hearing, a finding of facts, an order, judgment or decree, a sale, and a confirmation or homologation, before the "new title paramount" can be evolved from probate proceedings.

The condemnation and sale of a decedent's estate, to pay debts of his succession, may contain all these requisites. The statute requirements differ in different States. To pursue the remedy to the final result of "title good against all the world," there must be general notice.

§ 564. **The Seizure, Lien, Information, Notice.** When probate jurisdiction to proceed *in rem* has been conferred by law through any form of expression, and when the usual course of procedure has been adopted, we find the characteristics of the *actio in rem*, as follows:

The *res* is the decedent's estate.

The seizure is usually obviated by the fact that the administrator of the estate becomes the custodian by virtue of his office; and there is no proceeding *in rem*, in admiralty or at law, where seizure would be necessary when the *res* is already in court. But should the estate be in the adverse possession of another, it would be necessary for the administrator to gain possession; necessary that the estate should be in court, in order to give the probate jurisdiction over it.

The *jus ad rem* is in the creditor; for, though the debt may have been an ordinary one, merely personal, before the death of the decedent, it did not so descend to the heirs, since, aside from the property, the heirs are not debtors, unless they have accepted the succession unconditionally. Upon the death, the debts, previously a personal obligation, become immediately a property obligation, with all the force of a lien upon the decedent's estate. No person thereafter owes any debt, but the estate owes it; and the heirs take so much as remains after the satisfaction of the debt.

The information's equivalent is found in the statement of the debts, the petition for their allowance and the petition for the sale to pay the debts, with description of the property to be sold, etc. Such papers are usually presented by the adminis-

trator, whose duty it is to pay all just debts under the order of the court; but, should he not admit any particular debt, who would be the instigator of the proceeding against the property to satisfy that debt? The denied creditor, of course. If all debts were denied, all creditors would be likely to move the court; therefore the libellant's equivalent is the creditor, acting directly, or through the administrator. If the latter has placed all the creditors on his *bilan*, with the correct amount due each by the estate, the necessity of their moving the court is obviated; but since, in case of his neglect or refusal to do so, they have the right to apply to the court to make him do it, they evidently are the real parties in action against the *res*. The administrator represents the estate, but there is no inconsistency in his admission of the just indebtedness and thus obviating the necessity of the appearance of the real *lien* holders as actors against the *res* through him.

Notice to all persons interested to oppose the allowance of the creditors' claims against the *res*, must be duly given by monition or publication, since personal citation on all the world is impossible. Opportunity for opposition to the *tableau* must be amply afforded, since it is judicially impossible to divest all persons of their rights without a hearing. In the absence of notice, therefore, the decree cannot be *res adjudicata quoad* all the world, nor can the new title paramount be conveyed to the purchaser at the sale.

§ 565. **The Hearing, Finding, Condemnation, Etc.** The hearing is had whenever there is opposition to the allowance of the credits placed upon the *tableau*; or when some omitted creditor applies to have his claim put thereon: otherwise, there is no need of trying contradictorily the validity of the admitted claims, as, indeed, there would be no such need in any proceeding against an indebted thing should the indebtedness be admitted by a competent representative of the thing, all other persons having been defaulted. The formal default is not usual in probate proceedings; and the failure of the statutes to require it does not take from such proceeding the character of being *in rem*, when all the essentials appear, and when there is a virtual default.

The finding of the facts is the ascertainment of the indebtedness, either from the admission of the administrator representing the *res* by placing the amounts due the creditors on the *tableau*, or by other proof when the law requires it—always by other proof when there is opposition to the tableau, and when the fact appears that some credit had been wrongfully omitted or wrongfully allowed by the administrator.

The relative condemnation of the *res*, as an indebted thing, is found in the judgment homologating the account, and decreeing the estate to pay, and ordering the sale. It is frequently found before the homologation of the account, as when the estate is condemned to be sold upon proof that the debts as a whole require the order of sale to convert the estate to cash for the purpose of distribution when the tableau shall be approved.

The distribution of the proceeds among the creditors, according to their rank, follows as in any case *in rem*; the remnant is paid over to the heirs, as surplus proceeds are paid over to the owners of any *res* condemned for debt.

The confirmation may be directly made by the court, which is usual in probate proceedings. The judgment of distribution is also considered a confirmation or homologation of the sale.

When all the foregoing requisites are found in a probate proceeding, it is *in rem*; and if all persons have been notified, the title emanating therefrom is the new title paramount.

§ 566. **Grignon's Lessee v. Astor.** The most frequently quoted case in support of the doctrine that a proceeding against a decedent's property to pay its debts is *in rem*, and "analogous to proceedings in admiralty in which all the world are parties," is that of *Grignon's Lessee v. Astor et al.*¹

The facts were that Peter Grignon died intestate; that his estate was administered upon, and his lands sold to pay debts, pursuant to an order of a county court, in Wisconsin, issued upon application of the administrator, who presented the certificate of the probate judge showing the sale necessary to pay the debts due by the succession, as required by a territorial law of Michigan in force in Wisconsin. Astor and others bought

¹ *Grignon v. Astor*, 2 How. 319.

the land sold under this order; whereupon this litigation arose: the lessees of the heirs of Peter Grignon averring want of notice and other irregularities. The case was taken to the United States Supreme Court, where it was decided that the proceedings had been *in rem*, that they were analogous to a proceeding in admiralty in which all the world are parties, and that the new title paramount resulted from the proceedings and sale, and became vested in Astor and others.

The facts were somewhat anomalous, since the probate judge did not order the sale, but, under the territorial act, gave his certificate to the county judge, who, upon the application of the administrator, ordered the sale.

Looking for that analogy of which Mr. Justice BALDWIN spoke in rendering the final decision, we meet no difficulty in finding the land to be the *res*; the administrator's official possession to be equivalent to custody, after seizure; the creditors to be the parties making the movement, like libellants, though through the administrator; the general lien, which they held, (after the personal debtor's death,) upon the estate, to be the *jus ad rem*; the judgment of the probate court, (evidenced by his certificate that the lands should be sold to pay the debts,) united with the county judge's order of sale, to be the condemnation, (if there was any condemnation;) but we do find difficulty on the subject of notice. The third section of the territorial act expressly required notice to the adverse parties, and a hearing contradictorily with them before the order of sale should be granted by the county court; but the record that was before the Supreme Court disclosed no such notice; and there was no appearance of any opponents at the hearing.

§ 567. **Could All be Considered Parties in the Absence of Notice?** Mr. Justice BALDWIN said that in a proceeding *in rem*, there are no "adverse parties;" but he immediately added, "all the world are parties." If he meant that no adverse parties are sued, proceeded against, cited as personal defendants, he was clearly right; but if he meant that, while all the world are parties in the sense that all are to be concluded by the judgment, yet that no one could respond to notice and become an actual "adverse party," it would seem that the position was indefens-

ible. If he believed that the title paramount could be evolved, (so as to be free from all liens, and so as to rest securely upon a decree that was *res adjudicata* with regard to all persons,) from a proceeding not either actually or constructively conducted contradictorily with all claimants, intervenors or opponents; and from a decree not rendered pursuant to the statute nor in conformity to the long established principles of proceedings *in rem*, we are at a loss to understand what importance he attached to notice.

Yet he did not hold that the title of Astor could have been good and paramount, had the notice altogether been omitted. He did not intimate that notice to all persons was any less necessary to bind all, in an action *in rem*, than it is to the party sued, in an action *in personam*. But he did hold that, since the record did not disclose notice, the court might presume the fact that notice had been given, with all the other facts presumable after decree. Here a plain difference may be remarked between the assumption of notice as one of the facts found, and the entire want of notice: yet this case has been frequently cited to sustain the doctrine that notice is not necessary to the validity of a decree *in rem*.

§ 568. **Jurisdictional Facts not Presumed.** The error of the decision, with regard to notice, though less than has been attributed to it, is yet palpable; for if a jurisdictional fact may be presumed, what safeguard exists against the doing by judges of whatever they may choose to do? What becomes of constitutional barriers against assaults upon rights; the inhibition of the taking of property without due process of law; the ban against the condemnation of man or thing without fair trial? It would not be contended that notice need not appear of record in a suit *in personam*, when one person of all the world is the party to be informed: can any reason be given why, in an action against a thing, when all the world are parties to be affected by the decree, public notice should not appear of record to have been given, according to usage immemorial?

There were no "adverse parties" who made appearance in the original proceedings out of which *Grignon v. Astor* grew; but, (if we must hold that there was no notice, when the record

disclosed none, as we must,) how do we know that the heirs of Peter Grignon would not have opposed the order of sale, had they been given the opportunity? How do we know but that some creditor omitted from the administrator's tableau, (if he had already filed one,) might have arisen as a third opponent? How do we know but that some stranger would have become a third opponent and set up title in himself to the very land about to be sold for bearing the burden of the intestate's debts?

Certain it is that there is no royal road upon which we can proceed *in rem* so as to get around the constitutional right of all such persons to be notified and heard. Certain it is that the goal—the new title shorn of all liens—cannot be reached by any other avenue than the wide open one which the law lays out.

§ 569. **No Presumption of Notice to all Persons.** Judge BALDWIN's analogy is lost the moment he says that notice is a fact to be presumed along with the findings not jurisdictional; for, in admiralty, notice must appear of record, whether the cause be *in personam* or *in rem*, unless want of it is cured by the appearance of all parties interested. It is true that it has been said that seizure is notice; but it will easily be perceived that it is such only to the person from whose custody the *res* is taken when it is first arrested, or to those presumed by law to know of the seizure of their property. It is true that it has been said that the owners of land are presumed to know when it is in the adverse possession of another; but this presumption is of limited extent, and does not go so far as to relieve from the want of notice in a personal suit in which land is sequestered. In this case, Grignon's heirs, though owners, were entitled to notice under the statute. Besides, if the two circumstances suggested should render further notice unnecessary with regard to persons directly dispossessed of the thing seized, they would yet have no applicability to a creditor left off the *bilan* who might wish to oppose selling the decedent's estate to pay only the creditors who had been put on. Ought not such an interested party to have notice by publication in the usual way? And, if the record fail to show that he had any, must

not the whole proceeding *in rem* be treated as not affecting him?

It should be remembered too, that possession was by the administrator before the sale, so that the rule that seizure of land is notice to the owner would hardly apply.

The Grignon case seems to have had less influence upon the subject of the presumption of notice, in Wisconsin, where it originated, than it has unfortunately had elsewhere. In that State, the jurisdictional fact of notice can no more be presumed in an action *in rem*, in order to bind unnotified parties, than in a personal suit. Judge PAYNE well expressed the law, when he said,¹ of the sale pursuant to order without notice: "We think that the sale must be held void, because the record fails to disclose any notice to the heirs at law of the time and place of hearing the application. The statute required such notice to be given before any application should be heard. The record offered to sustain that sale contains no proof whatever that any notice was given. * * * The question then is, whether an administrator's sale, under a license from the probate court, can be sustained where the record fails to show notice to the heirs at law as required by the statute. And we are of opinion that it cannot be. There may be some cases where it is intimated that such notice is not jurisdictional. But we regard the opposite doctrine as established by the weight of authority, and resting upon the soundest principles; and that it is also established that the record of probate courts must show jurisdiction in order to sustain their proceedings."

§ 570. **When Notice is Required by Statute.** It seems to be generally conceded that if notice is, by the statute of a State, made essential to the jurisdiction, it should appear of record.² Courts could hardly hold otherwise. But when the statute is only directory on the subject of notice, many courts have gone

¹ Gibbs v. Shaw, 17 Wis. 197.

² Babbit v. Doe, 4 Ind. 355; Guy v. Pierson, 21 Ind. 18; Cooper v. Sunderland, 3 Iowa, 114; Thornton v. Mulquinne, 12 Iowa, 549; Gelstrop v. Moore, 26 Miss. 206; Hawley v.

Mead, 52 Vt. 343; Rollins v. Clement, 49 Vt. 98; Folsom v. Connor, 49 Vt. 4; Kidder v. Hadley, 25 Vt. 544; Whitney v. Silver, 22 Vt. 634; Alexander v. Abbott, 21 Vt. 476.

so far as to hold sales under probate decree to be valid, though the record fail to show notice; and to treat notice as a fact to be presumed, after decree.¹ And even where the record shows that no notice has been given, sales under probate decree have been sustained;² some of the courts assuming the proposition that heirship is a right conferred by government, and that therefore decedents' estates may be sold without notice, to pay debts, etc.; and that the order of sale and its execution would bind the heirs and all others. It would seem difficult to decide whether the premise or the inference is the more erroneous.

And in a previous Wisconsin case, the court had said that though it had been held in *Grignon v. Astor*, that "the provision in the statute requiring notice to be given to the parties interested before the court should pass upon the application, did not affect the jurisdiction," yet, that the doctrine was "certainly not in conformity with a long list of adjudications that might be cited."³

The doctrine, that notice is a jurisdictional fact, (so that no one can be concluded by a judgment rendered against a thing, where he has not been notified personally or by published mo-

¹ *Sheldon v. Newton*, 3 Ohio St. 495; *Paul v. Hussey*, 35 Me. 97; *Fox v. Hoyt*, 12 Ct. 491; *Raymond v. Bell*, 18 Ct. 81; *Reeves v. Townsend*, 22 N. J. 296; *Wright v. Marsh*, 2 G. Greene, 111; *Wilson v. Wilson*, 18 Ala. 176; *Carter v. Waugh*, 46 Ala. 452; *George v. Watson*, 19 Tex. 354; *Goudy v. Hall*, 36 Ill. 313; *Moore v. Neil*, 39 Id. 262; *Myer v. McDougal*, 47 Id. 278; *Davenport Loan Association v. Schmidt*, 15 Iowa, 213; *Morrow v. Weed*, 4 Iowa, 77; *Frazier v. Steenrod*, 7 Iowa, 339; *Wright v. Warner*, 1 Douglass, (Mich.) 384; *Clarke v. Holmes*, Id. 390; *Clark v. Blacker*, 1 Ind. 215; *Hart v. Jewett*, 11 Iowa, 276; *McPherson v. Cunliff*, 11 S. & R. 422; *Simpson v. Hart*, 1 Johns. Ch. 91; *Elliott v. Piersol*, 1 Pet. 328;

Thompson v. Tolmie, 2 Pet. 157; *Voorhies v. B'k U. S.* 10 Pet. 473.

² See and compare, *Florentine v. Barton*, 2 Wall. 216; *Stow v. Kimball*, 28 Ill. 93; *Adams v. Jeffries*, 12 Ohio, 253; *Ludlow's Heirs v. Johnson*, 3 Ohio, 560; *Benson v. Cilley*, 8 Ohio St. 614; *Robb v. Irwin*, 15 Ohio 698; *Sheldon v. Newton*, 3 Ohio St. 495; *Saltonstal v. Riley*, 28 Ala. 164.

³ *Stark v. Brown*, 12 Wis. 582; and, the court adds, continuing from the close of the above quotation: "among which are the following: *Bloom v. Burdick*, 1 Hill, 130; *Sherry v. Dean*, 8 Blatchf. 542; *Givan v. McCarroll*, 7 S. Dell. 351, *Lessees of Adams v. Jeffries*, 12 Ohio, 253; *Messenger v. Klintner*, 4 Bin. 97; *Schneider v. McFarland*, 2 Comst. 459; *Bank v. Johnson and others*, 7 S. & M. 449."

nition,) is avowed or assumed in so many decisions that an inventory of them would be tedious.¹

§ 571. **The Record Must Show Notice.** The question, whether notice may be presumed, has been frequently tortured into a very different one: Whether the probate judge must have jurisdiction over the persons of those interested in a sale to pay a decedent's debts? Notice to all persons interested or claiming to have an interest is addressed to persons living beyond the jurisdiction of the court; to persons in Europe, all the world; but jurisdiction over persons whom the probate judge's process can reach and bring forcibly into court, is confined to his own bailiwick.

The probate court, like any other, when it proceeds against a thing, must have jurisdiction over that thing, and need have none over its owner. But, in order that the condemnation of that thing may bind all persons, including the owner, general notice must be published; and from the four quarters of the earth, claimants may come and voluntarily put themselves under the jurisdiction of the court. The Supreme Court of Iowa were divided on the question of personal notice in probate proceedings.² Half the judges thought the probate court should have jurisdiction of the persons of those interested in a decedent's property in order to a lawful sale of it to pay estate debts: half thought the other way: so, the question, having been decided affirmatively in the court *a quo*, remained undisturbed. And the decision thus arrived at, has since been reaffirmed.³

The true rule is, the court need have jurisdiction only of the thing; but it cannot divest liens without notice to the lien

¹ Pope v. Cutler, 34 Mich. 152; Gillett v. Needham, 37 Mich. 143; Sitzman v. Pacquette, 13 Wis. 291; Corwin v. Merritt, 3 Barb. 341; Sheldon v. Wright, 5 N. Y. 518; Ridgeway v. Coles, 6 Bosw. 486; Sibley v. Waffle, 16 N. Y. 185; Bloom v. Burdick, 1 Hill, 140; Clark v. Holmes, 1 Doug. (Mich.) 394; Palmer v. Oakley, 2 Id. 472; Greenvault v. F. & M.

Bank, 2 Id. 472; French v. Hoyt, 6 N. H. 370; Dakin v. Hudson, 6 Cow. 222; Doe v. Anderson, 5 Ind. 34; Babbit v. Doe, 4 Ind. 356; Arnold v. Nye, 23 Mich. 292; Ryder v. Flanders, 30 Mich. 341; Bloom v. Burdick, 1 Hill. 137.

² Good v. Norley, 28 Iowa, 188.

³ Rankin v. Miller, 43 Iowa, 11.

holders; nor any interest, without notice to the interest holders. The notified may come, as affirmative parties, into court or not. They are not proceeded against as the thing is; they are not made "adverse parties," though they have the right to make themselves such; and surely they cannot have default entered against them without previous notice.

Much misapprehension has been exhibited, of the expression of Judge BALDWIN in the case of *Grignon v. Astor*: "the administrator represented the estate."¹ Even judges have written opinions based upon the understanding that he was said to represent the heirs of that estate. The heirs had the right to oppose the sale: did he represent opponents, so as to preclude the necessity of notifying them, while he, at the same time, was the applicant for the order of sale? In representing the *res*, did he also represent all possible claimants of that *res*? Did he represent "all the world," so as to bring all the world within the county judge's bounds, for jurisdictional purposes?

This much space has been given to the decision, because it has had a large following, both for its good matter and its other matter; it has been cited very frequently, both by the National and the State courts. Its leading doctrine, that proceedings *in rem* to condemn the estate of a decedent to pay the debts of such estate, are analogous to proceedings *in rem* in admiralty, in which the decree of condemnation is conclusive against all the world, and from which the new title paramount arises, has been repeatedly accepted.² But the acceptance has not been universal, since it has been "repudiated" in Illinois,³

¹ As to the administrator representing the land, in this sense, see the following: *Moore v. Starks*, 1 Ohio St. 369; *Wilkinson v. Leland*, 2 Pet. 657; *Perkins v. Fairfield*, 11 Mass. 227; *Rice v. Parkman*, 16 Mass. 328; *Borden v. The State*, 11 Ark. 519; *Tongue v. Martin*, 6 H. & J. 23; *Sohier v. Mass. Gen'l Hos.* 3 Cush. 487.

² *Florentine v. Barton*, 2 Wall. 216; *Beauregard v. New Orleans*, 18 How. 503; *Pennoyer v. Neff*, (5 Otto.) 95 U. S. 715; *Green v. Van Buskirk*, 5 Wall. 307; *Christmas v. Russel*, 5

Wall. 306; *Story's Conflict of Laws*, § 592; *Melhop & Kingman v. Doane*, 31 Iowa, 397; *Moore v. Shultz*, 13 Pa. State, 102.

³ *Donlin v. Hettinger*, 57 Ill. 348; *Fell v. Young*, 63 Ill. 106. See, also, *Clark v. Thompson*, 47 Ill. 25; *Herdman v. Short*, 18 Ill. 59; *Gibson v. Role*, 27 Ill. 88; *Botsford v. O'Connor*, 57 Ill. 72; *Johnson v. Johnson*, 30 Ill. 215. But, see *Mason v. Wait*, 5 Ill. 127; *Smith v. Race*, 27 Ill. 387; *Mulford v. Beveridge*, 78 Ill. 455.

and not followed by the State courts in Wisconsin.¹ And probate sales in Indiana, without notice to the heirs, is held void.²

§ 572. **Whether Notice May be Omitted When not Expressly Required by Statute.** There is a popular error, prevailing in several of the States, in the opinion that where statutes require probate judges to give notice to all interested in the decedent's estate before condemning it to be sold as a thing indebted to satisfy the creditors' liens, such notice must be given, but *need not be when not required by statute*. While there might be a proceeding against a thing, without any notice of any sort, (which would be binding fictitiously on that thing, if it had been previously abandoned, but not on any person whatever,) the erroneous doctrine goes so far as to hold all the world bound, without notice, if the legislature choose to have it so! It is needless to argue the unconstitutionality of all legislative enactments for taking away one's own, without a hearing of him if he wants to be heard—by process *in rem* or otherwise. It does not lie in the power of the legislature of a State, or of the Congress of the United States, to enact a law for the condemnation of property *in rem* without notice to interested parties, so as to bind those parties. There are decisions, however, which seem contrary to the view of notice herein expressed.³

§ 573. **Analogy of Probate Practice in Louisiana to Admiralty Causes in Rem.** Probate proceedings *in rem* may be illustrated by reference to the practice in the civil-law State of Louisiana. There, the administrator's relation to personal property is precisely the same as to real. He becomes legally possessed of all, but only for the purpose of administration; the purpose of settling the succession by paying the debts and transmitting the residue to the heirs. Being, in this capacity, the custodian of all the decedent's estate, he publishes a notice for all creditors to present their claims; he causes an inventory

¹ Post, §§ 574-576.

² Babbitt v. Doe, 4 Ind. 355; Doe v. Anderson, 5 Ind. 33; Doe v. Bowen, 8 Ind. 197; Gerrard v. Johnson, 12 Ind. 636; Hawkins v. Hawkins, 28 Ind. 70.

³ See Danance v. Preston, 18 Iowa, 396; Banta v. Wood, 32 Id. 469; George v. Watson, 19 Tex. 354; Alexander v. Maverick, 18 Tex. 179; Thomas v. Southard, 2 Dana, 475; Spencer v. Shehan, 19 Min. 338; Montour v. Purdy, 11 Min. 384.

of all the assets to be prepared with a list of all the recorded liens; he files a tableau exhibiting all the debts which he admits to be owing, usually arranging them according to rank, and petitions the court to have public notice given to all persons, and for the homologation of his account after the expiration of the legal delay allowed for all opponents to appear and claim the property, or present omitted debts, or contest any item already on the tableau, or dispute the rank given to admitted creditors, or make any opposition whatever. Then follows the hearing of all the contending parties; and, upon due proof of the indebtedness, the estate is condemned to pay. The decree is not, in terms, a condemnation of the estate, but it is that in substance.

But often the condemnation precedes the hearing of the oppositions, and the judgment upon particular claims; as when there is proof to the court that the succession is insolvent; or that, if not insolvent, it is necessary to convert a portion of it into cash in order to pay the debts. If the court, upon such proof being made, should condemn the whole estate, or a specified portion, to be sold to pay debts, we have an example of an order *in rem* preceding the hearing of the opposition. But a sale thereunder could hardly be said to result in the title paramount, unless the confirmation should be deferred till after all appearers in response to notice had been heard.

When the decree of condemnation, (by whatever name designated,) has been regularly rendered by a competent probate court having jurisdiction of the subject matter; and all interested parties have been heard, or have had the opportunity of being heard; and sale has followed the decree, and homologation has followed the sale, the purchaser has the title paramount. The estate being settled, the court orders the heirs to be put in possession of the surplus proceeds of the sold property, (if any,) and of all the unsold part of the *res* or estate; and then the administrator gets his discharge.

The system of procedure is succinctly described in the Louisiana Civil Code and Code of Practice, which closely follow the Code Napoleon, and which contain not merely statutory regulations but a statement of principles.

The decisions of that State treat probate proceedings as *in rem*, and hold that all liens, including mortgage liens, are removed by the decree and sale, from the property to the proceeds.¹

The Succession of Hawkins shows that ordinary claims against a debtor become general liens against his property upon his death; and, upon sale of the property for the purpose of paying debts of a succession, the general liens are transferred to the proceeds; but, in marshalling the liens, the specific ones which existed against the property before sale and which now rest upon the proceeds, all outrank the general liens.

§ 574. **Practice in Other States.** In Alabama, the Supreme Court say that it is the "settled doctrine" that a probate proceeding for the sale of a decedent's land, is *in rem*.² And in many other of the States, such proceedings are *in rem*, though in most of them, the decree is not conclusive against the world, for want of notice and judgment by default.³ In Wisconsin, while the United States Circuit Court follows the Grignon-Astor case, and that of *Comstock v. Crawford*,⁴ (both from

¹ *Wooley v. Russ*, 24 La. Annual R. 482; *Durand v. Dubuclet*, Id. 155; *Succession of Armat*, 20 Id. 340; *Wright v. Cummings*, 19 Id. 353; *Millie v. Herbert*, Id. 58; *Succession of Guernsey*, 14 Id. 632; *Succession of Wadsworth*, 2 Id. 966; *Succession of Hawkins*, Id. 923; *Succession of Day*, Id. 895; *Gibson v. Foster*, Id. 503.

² *Wyman v. Campbell*, 6 Porter, 232; *Satcher v. Satcher*, 41 Ala. 26; *Lightfoot v. Doe*, 1 Id. 479; *Rivers v. Thompson*, 43 Id. 633; *King v. Kent*, 29 Id. 542; *Matheson v. Hearin*, Id. 210; *Field v. Goldsby*, 28 Id. 218. But, see the case of *Garrett v. Bonner*, 59 Ala. 513, in which it is said that such proceeding is *in rem*, but is changed to a suit *in personam* if appealed or removed by writ of error, to test the regularity of the proceedings.

³ *Wright v. Jordan*, 71 Ind. 1; *West*

v. Townsend, 12 Ind. 484; *Moore v. Shultz*, 13 Pa. State, 103; *West Pa. R. R. v. Johnston*, 59 Pa. State, 290; *Cadmus v. Jackson*, 52 Pa. State, 295; *Wilson v. Bergen*, 28 N. H. 96; *Merrill v. Harriss*, 26 N. H. 142; *Shields v. Ashby*, 16 Mo. 471; *Chandler v. Burdett*, 20 Tex. 42; *McMillar v. Butler*, Id. 402; *Miller's Executors v. Greenham*, 11 Ohio State, 486; *Willard v. Nason*, 5 Mass. 240; *Torrance v. Torrance*, 53 Pa. State, 505; *Johnson v. Collins*, 12 Ala. 322; *George v. Williamson*, 26 Mo. 190; *Crall v. Meem*, 8 Gratt. 496; *McCandlish v. Keen*, 13 Gratt. 615; *Corwin v. Merritt*, 3 Barb. 341; *Bloom v. Burdick*, 1 Hill, 130; *Schneider v. McFarland*, 2 N. Y. 459; *Williams v. Chidress*, 25 Miss. 78; *Gelstrop v. Moore*, 26 Miss. 206; *Miller v. Miller*, 10 Tex. 319.

⁴ *Comstock v. Crawford*, 3 Wall. 396, 403, 404; *Mohr v. Manierre*, 101 U. S. 417, (7 Bis. 419.)

that State,) the State courts have held notice essential and jurisdictional;¹ but now the ruling of the Supreme Court of that State is modified so as not to hold notice essential to the jurisdiction so far as the interest of a ward is concerned in the sale of his property by a guardian.²

The several cases above cited of *Mohr* against *Tulip*, *Manierre*, and *Porter*, respectively, (each having been a purchaser of property at sales by a guardian under order of court at a time when *Mohr* was under tutelage as an insane person,) to eject them from lands purchased, because of want of notice to adverse parties to invite them to appear to contest the probate proceedings and to obtain order of sale, present such conflict of views, and such exposition of probate proceedings *in rem* with regard to notice, that they seem to require some passing comment.

Mohr, having recovered from his malady, and been restored to the management of his affairs, brought these actions of ejectment, relying upon the statute which required notice. The courts have differed; but now they agree that the sale was not void as to *Mohr*. This the United States Supreme Court held in the case against *Manierre*; and to this ruling the Wisconsin Supreme Court have conformed, in the subsequent case, against *Porter*.

§ 575. **Views of the Supreme Court.** In passing upon the former case, the United States Supreme Court, after showing that the object of notice is to afford persons holding adverse interests an opportunity to be heard; and that a ward applying through his guardian, for an order to sell his own property need not notify himself; and that, on afterwards becoming the manager of his affairs, he cannot complain of want of notice, concluded: "We see no reason therefore, so far as his interests are affected, to depart from the doctrine of *Grignon's Lessee v. Astor*."

The decision goes no further than that the probate court pro-

¹ *Sitzman v. Pacquette*, 13 Wis. 292; *Mohr v. Tulip*, 40 Wis. 66; *Salter v. Hilgen*, 40 Wis. 363; *Tallman v. McCarty*, 11 Wis. 401; *Gibbs v. Shaw*, 17 Wis. 197; *Blodgett v.*

Hitt, 29 Wis. 176; *Chase v. Ross*, 36 Wis. 267; *McCrudd v. Bray*, 36 Wis. 333; *Reynolds v. Schmidt*, 20 Wis. 374.

² *Mohr v. Porter*, 57 Wis. 487.

ceedings, resulting in the order of sale, were binding, so far as the interest of the ward was concerned. It does not go the length of *Grignon v. Astor*, and hold that the proceedings were binding upon all the world, because all the world were parties—constructive notice to all being presumed. On the contrary, there seems to be an intimation that the court saw reason to depart from the doctrine of that case, if the interests of unnotified third persons had been sought to be affected.

If the proceeding was *in rem*, it certainly was not *in rem* with general notice. If the probate court had jurisdiction, that jurisdiction was no more than authority to hear the application and any opposition thereto; to determine whether to grant the order to sell whatever interest the applicant, (*i. e.*, the ward,) had; to make the order, etc. The jurisdiction did not extend to the *res* so far as any interests of unnotified persons were in it. Had there been general notice, the jurisdiction of the court would have included the power to hear and determine all interests in, or appertaining to, the *res*; power to declare the divestment of all titles thereto or liens thereon: provided there was statute authorization. In other words, if Mohr's application, through his guardian, for the sale of his own interests, was a proceeding *against* his title in the land, it yet is not possible that it could be analogous to an admiralty case *in rem* with universal notice, such as *Grignon's Lessee v. Astor* was erroneously held to have been.

§ 576. **Views of the Supreme Court of Wisconsin.** In modifying their previously held doctrine, so as to make it conform somewhat to the Manierre decision, the Supreme Court of Wisconsin concede that the applicant need not notify himself; but they add, "so far as there is any conflict between the decisions of this court and the case of *Grignon's Lessee v. Astor*, we should adhere to our own decisions;" *i. e.*, decisions in relation to sales of real estate made by executors or administrators under probate orders. And the reason they give, is that "the notice is not to give the court jurisdiction of the subject matter, but of the persons of the parties having adverse rights to be passed upon."

The position seems right; but the reason, wrong. How can

there be jurisdiction over persons—persons, it may be, who are in foreign countries—in a proceeding *in rem*? How can notice by publication give jurisdiction over persons beyond the bailiwick? How can that enable the court to give personal judgment against them?

Jurisdiction over the subject matter is enough: but what is the subject matter? It is the interest of one man in the *res*, if only one is notified; of two, if two are notified; of all men, if all are notified.

Jurisdiction over that which all persons are given the opportunity of claiming, includes power to take the silence of all as consent to condemnation: so all non-appearers may be defaulted, and their interests divested; so there may be an adjudication of the thing that will hold good against all the world.

The most serious criticism to which all the decisions of those cases of *Mohr* are liable, is that there is confusion as to the character of the proceedings therein discussed—whether really *in rem* or *in personam*. In following the line of argument, it seems that portions of the judicial reasoning take for granted that the proceedings were of the one character, while some parts of it rest on the assumption of the other.

In *Mohr v. Porter*, it is said, “This court agrees with the Supreme Court of the United States that the object of the notice is to bring before the court parties interested in the proceedings,” (which is agreeing that the proceeding is *in rem*;) “and expressly holds that the notice is in the nature of process to give the court jurisdiction of the persons of the parties interested,” (which is treating the proceeding as *in personam*.) Other citations to the same effect might be made, both from this decision, and that above mentioned from the United States court—*Mohr v. Manierre*.

§ 577. **No Jurisdiction of Persons.** Such vagueness is not uncommon when such proceedings are resorted to in State practice. It was said, in *New York*, (quoted in the *Porter* case,) that notice “is in the nature of first process to summon the parties, and is indispensable to enable the court to get jurisdiction of the persons of the parties interested in the proceed-

ings;"¹ which is equivalent to saying that the "proceedings" mentioned are *inter partes*, and therefore not against a thing; yet the idea sought to be conveyed is that the court must have jurisdiction over the persons of all holders of rights *in* or *to* the *res* seized, before it can have jurisdiction over the *res* with power to declare judgment *pro confesso* against non-appearers who have been informed; and power to condemn the *res*.

Like inconsistency has been elsewhere repeatedly noticed herein.

Doubtless the Wisconsin court rightly stated the difference between probate proceedings *in rem* with general notice, and such proceedings with limited notice, when they said that those who are notified or who appear, are concluded by the decree, while others are not.² And, again: "Want of notice only makes such proceedings void as to the persons not appearing or assenting;"³ *i. e.*, where there has been no notice by publication at all, but where some one has appeared; some owner, perhaps, who has the knowledge of the seizure of his own property. But this evidently right view is obscured by its close connection with the assertions that jurisdiction of the *parties* or *persons* interested is "unquestionably necessary;" that "such proceeding is in the nature of a suit, and the *defendants* must have notice as in other cases of suits at law or in equity." * * *

And, in the Porter case, the court speak of there having been a "question" before the Supreme Court of the United States in *Mohr v. Manierre*, "whether the proceeding should be considered an adversary proceeding or a proceeding *in rem*;" and of the "question" not having been decided.⁴ How can we expect clear conclusions so long as the courts doubt whether such probate proceedings are against things or against persons?

Massachusetts and Michigan have statutes similar to, if not uniform with, that of Wisconsin; and they have received interpretation.⁵

¹ Corwin v. Merritt, 3 Barb. 341; Bloom v. Burdick, 1 Hill, 130; Schneider v. McFarland, 2 N. Y. 459.

² Odell v. Rogers, 44 Wis. 172, (cited with approval on p. 494 of 51 Wis.

in *Mohr v. Porter*.)

³ Gibbs v. Shaw, 17 Wis. 197, (also so cited in the Porter case.)

⁴ 51 Wis. 495.

⁵ Cooper v. Robinson, 2 Cush. 184;

Whatever may be decided, it remains certain that no administrator, no guardian, no court, no legislature can divest a man's right in or to property, by any proceedings judicial, legislative, executive or ministerial, without giving him an opportunity to be heard, where opportunity is possible.

In some of the States, the only notice required by statute is notice to the heirs.¹ Notice to the "nearest of kin," is sometimes required. In Louisiana, sale of minors' property, is recommended by a "family meeting." The object of the notice, in such case, is that the representative of the minor may have the benefit of advice; and that he may be opposed, if the wards' interests should so require. Such notice is not what has been herein discussed.

§ 578. **Probate Sales not Actions in Rem.** It will not be understood, as taught, anywhere in this chapter, that probate sales of decedents' estates are "proceedings *in rem*." The sale of a thing is not an action against a thing.

Nor will it be understood that probate judicial proceedings whence issue orders of sale, are always *in rem*. If those proceedings are conducted contradictorily with persons, after citation, and the judgment is against them as defendants, the case is *in personam*.

Nor will it be understood that every probate proceeding *in rem* is "analogous to a proceeding in admiralty in which all the world are parties;" for, without notice to the world, or to any one, or the appearance of some voluntary party, the effect of the decree must necessarily be confined to the thing condemned; and such a decree would not be worth the ink of it, since no one's rights in or to it would be divested. But, where the seizure itself is presumptive notice to the person from whom the property is taken, or to any one legally presumed to know of the seizure, the condemnation of it would hold good as to him. All statutory requirements, however, must be obeyed.²

Howard v. Moore, 2 Mich. 227, Coon v. Fry, 6 Mich. 506; Marvin v. Schilling, 12 Id. 356.

¹ R. S. Ind. ii., 521; Jones v. Levi,

76 Ind. 592; Seward v. Clark, 67 Ind. 289.

² Toll v. Wright, 37 Mich. 93; Stewart v. Baily, 28 Id. 252; Woods

§ 579. **Partial Notice and General Notice.** Judge STRONG, as the organ of the Supreme Court, discussing the effect of a decree of confiscation, said: "Decrees in courts of probate or orphans' courts directing sales for the payment of a decedent's debts or for distribution are proceedings *in rem*."¹ The inference drawn by the court from this *premise*, was that a condemnation in a proceeding *in rem* is not necessarily conclusive against non-appearing lien holders, and that notified and defaulted parties might successfully attack the condemned *res* by a collateral action. The court said: "In admiralty cases and in revenue cases a condemnation and sale generally pass the entire title to the property condemned and sold. This is because the thing condemned is considered as the offender or the debtor, and is seized in entirety. But such is not the case in many proceedings which are *in rem*. Decrees of courts of probate or orphans' courts directing sales for the payment of a decedent's debts or for distribution are proceedings *in rem*. So are sales under attachments or proceedings to foreclose a mortgage *quasi* proceedings *in rem*, at least. But in none of these is anything more sold than the estate of the decedent, or of the debtor or mortgagor, in the thing sold. The interests of others are not cut off or affected."

The court overlooked the important distinction between partial and general notice.

Proceedings *in rem* in admiralty and revenue cases are conclusive against all the world because all persons are notified by publication; but, in probate proceedings, mortgage foreclosures, etc., notice is usually confined to the heirs, the mortgagor, etc.

The former not only "generally pass the entire title to the property condemned and sold," but they always do under the required general notice. The latter would cut off "interests of others," if conducted under any statute requiring notice to

v. Monroe, 17 Id. 240; *Howard v. Wend.* 441; *Jackson v. Irwin*, 10 Id. 441; *Jackson v. Crawfords*, 12 Id. 533.
Moore, 2 Id. (Gibbs) 229; *Coon v.*
Fry, 6 Id. 506; *Heath v. Wells*, 5
Pick, 140; *Wellman v. Lawrence*, 15
Mass. 326; *Jackson v. Robinson*, 4

¹ *Day v. Micou*, 18 Wall. 160.

all persons and the default of all non-appears, and if such "other interests" were not presented.

The court said that the reason why "a condemnation and sale generally pass the entire title to the property condemned and sold," in admiralty and revenue cases, "is because the thing condemned is considered as the offender or debtor, and is seized in entirety." Would not this apply to the decedent's estate, which is proceeded against as the debtor, if it is proceeded against at all *in rem*? Were there notice to all the world, (and required so to be by statute,) would not the analogy be complete? Would not such a proceeding be "analogous to proceedings *in rem* in admiralty, in which all the world are parties," as the Supreme Court said in *Grignon's Lessee v. Astor*, when treating of the sale of a decedent's estate?

Did the court mean to confine universally conclusive decrees *in rem* to condemnations of things deemed offenders and debtors? Is not such conclusiveness as applicable to hostile things? The very proceedings they were considering had been against hostile things "seized in entirety;" the analogy to things seized in admiralty and revenue cases was complete. And the notice by publication to all the world had been made, and all non-respondents had been pronounced in contumacy and default. It is submitted that if, under such circumstances, the defaulted party was not precluded because persons in interest are not always precluded by probate proceedings, then a defaulted lien holder is not cut off by the condemnation of a ship in admiralty.

Let the legal reader bear in mind that, when the question arises whether a decree *in rem* is *res judicata* against all the world, the test is not whether the proceeding has been in probate or in admiralty, but whether the legally required notice has been partial or general.

The dissent to decisions, expressed or intimated in this chapter, should be understood as having no reference whatever to probate proceedings *in personam*, but as being confined to those which claim to be *in rem*, yet are wanting in the essentials of that proceeding while seeking to secure its results.

CHAPTER LV.

ATTACHMENT.

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§ 580. **The Action usually in Personam, if the Debtor Appears and Defends.** Attachment, as practiced under the laws of the several States with considerable uniformity, though with variety as to causes of action, has been often declared by courts and legal writers to be somewhat analogous to a proceeding *in rem*, or *quasi* such, or “in the nature of” that form of action. The Supreme Court have expressed what seems to be the generally prevailing idea of attachment, in the following words: “If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the

defendant; and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. "That such is the nature of this proceeding in this latter class of cases, is clearly evinced by two well-established propositions: *First*, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the property is exhausted. No writ can be maintained on such a judgment in the same court or any other, nor can it be used in evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of the defendant out of any other property than that attached in the suit. *Second*, the court, in such a suit, cannot proceed unless the officer finds some property of the defendant on which to levy the writ of attachment. A return that none can be found, is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."¹

§ 581. **How Changed to a Proceeding in Rem in Case of Non-appearance.** Such a suit is doubtless a personal action when first instituted; and it seems that it continues to be such, in case of the defendant's appearance; for he is treated, not as the claimant of the *res*, but as a defendant of the action, liable to a personal judgment to the full amount sued for, without reference to the value of the property attached.²

¹ Cooper v. Reynolds, 10 Wall. 308.

² Federal courts have no jurisdiction to proceed *in rem* in an ordinary case of attachment, on account of the non-appearance of the owner, if he live in a different State from that in which the court sits, and has not been cited. Such an owner may appear by attorney to have the case dismissed and the attachment dissolved, on the ground that he is a non-resident and has not been cited: Des Moines and Minn. R. R. Co. v. John B. Alley;

ex parte R. R. Co., 103 U. S. 794. The plaintiffs were domiciliated in Iowa, where the Circuit Court sat; the defendant, in Massachusetts. He appeared only as "a friend of the court," and had the cause dismissed for want of jurisdiction. Plaintiff then asked for a monition that they might proceed *in rem*, which was refused. Then they applied to the Supreme Court for a mandamus, which was likewise refused. See Nazoo v. Cragin, 3 Dillon, 474; Toland v. Sprague, 12 Pet.

How, in case of his non-appearance, is the character of the action changed to proceeding *in rem*? How is the constructive notice by publication, which is treated as a summons in case of appearance, changed to a monition to him to appear as a claimant, by reason of the fact of his non-appearance? How is the declaration against a personal debtor for a specified sum, converted into an information against a thing for such part of that sum as the seized property may be worth?

The answers to these questions must be found, if found at all, in the law of attachment and the practice under the law, and the expositions of the courts with regard to both. It must be that the action, from its inception, is a contingent one: personal, if the defendant respond; *in rem*, if two things happen: *first*, if something should be seized; *second*, if the owner do not appear. And the notice by publication must be contingent from its incipency: a summons, if it should be responded to, but a monition, if not.

The whole matter would be much simplified, if the statutes were to authorize and require that upon the seizure of property, pursuant to the filing of the affidavit and the issuance of the writ, an information directly against it should be filed and a constructive notice then published for the owner to appear as a claimant; but, with the statutes as they are, in the several States, we cannot arrive at the conclusion which courts and legal writers have reached, unless we consider that both the original declaration and the publication were of the contingent character above suggested, in contemplation of law, from the time of their beginning.

Contingent pleading and notice are novel indeed; but may not the legislator create such novelty? And may not the judicial exponent sustain it? And has it not the sanction of long practice?

The course pursued is that the creditor first institutes his action; and then, or soon thereafter, files an affidavit setting forth the ground or grounds for the attachment, (unless the

petition or declaration containing the necessary allegations, has been sworn to,) and then files a bond to protect the alleged debtor in case the attachment should prove to have been wrongfully obtained.

This treatise has to do with, not the case where the suit assumes a personal character upon the appearance of the defendant, but the case where he fails to respond to a published notice, and the action "becomes, in its essential nature, a proceeding *in rem*."¹

§ 582. **The Jus ad Rem Arises upon Seizure.** The whole theory of the law of attachment is based upon the want of any lien upon the debtor's property at the time of the institution of the proceedings. Some of the State statutes expressly except property, against which liens are recorded, from the operation of the writ of attachment; and all are for the purpose of enabling the creditor to secure what is due him by the seizure of property not primarily responsible for the owner's indebtedness.² There would be no danger of losing a debt secured by mortgage, so far as the mortgaged property might prove sufficient, in case the mortgagor should abscond, remove permanently from the State, etc.; or, other property with liens upon it recorded in favor of the creditor; but property not thus bound might be readily transferred, or the owner might be beyond reach of personal process or on the eve of becoming so. The very object of attachment laws, therefore, is to reach property not subject to lien—not primarily responsible by fiction of law.

Yet, it is still true, that without a *jus ad rem*, the creditor cannot proceed to make his money by the *actio in rem*. He must have a lien upon the property before he can render it liable to pay him. It might plausibly be argued that in case the debtor puts himself beyond the reach of personal process, a general lien would arise, like that which is created by operation of law upon a decedent's estate; for, since the debtor when beyond the jurisdiction of the court, can no more be personally served than a dead man, the creditor ought to have recourse

¹ Robinson v. Nat. B'k of New-
berne, 81 N. Y. 393; People v. Baker,
76 N. Y. 87; Casey v. Adams, 102 U.

S. 66; Kilburn v. Woodworth, 5
Johns. 37.

² Gates v. Bennett, 33 Ark 475.

against the absentee's effects. But the law of attachment does not rest upon this ground; for, if it were upon such theory, judgment against attached property would be retroactive, by the law of relation, to the time of the debtor's absconding or of his otherwise placing himself beyond the reach of process. Besides, such a theory would not be applicable to all the causes of action which authorize attachments; and the statutes of the different States make no distinction between causes of action with reference to the time when property becomes liable.

The time fixed is the date of the seizure. The grounds of attachment being properly laid and the writ duly issued, actual attachment gives the creditor a lien upon the thing attached.

The *jus ad rem* arises by operation of law, but not by operation upon contract, as is usually the case with regard to things indebted. Property which was not indebted when the writ of attachment was issued, becomes indebted by the writ's consummation. The creditor, who was an ordinary one when he instituted his action, becomes a lien holder when the seizing officer has found property of his debtor, though the creditor may not have had that distinct article of property in mind when he caused the writ to be issued.

§ 583. **The Lien Hypothetical.** The lien, however, is merely hypothetical, dependent upon confirmation by a judgment. If the attachment be set aside, *pendente lite*, for any cause, the seizure ceases to operate as a lien. If the cause be decided against the creditor, the decree renders the *jus ad rem* non-existent from its previously supposed origin. Even when confirmed by the judgment, it is ordinarily of low rank, incapable of displacing any recorded liens.¹ Among themselves, attachments are marshalled in the order of priority.

Liens which are not required to be recorded, such as maritime liens, are not displaced by attachment.² Attachment of a chattel in the State in which a mortgage upon it is not recorded,

¹ Baillio v. Poisset, 8 Martin, New Series, (La.) 337; Frazier v. Wilcox, 4 Rob. (La.) 517; Parker v. Farr, 2 Browne, 331; Peck v. Webber, 7 How. (Mi.) 658; Reeves v. Johnson, 7 Hal-

sted, 29; Meeker v. Wilson, 1 Gal. 419; Nathan v. Giles, 5 Taun. 558.

² The Royal Saxon, 1 Wallace, jr., 311. But, vide Taylor v. Carryl, 20 How. 583.

will take rank above the mortgage, if the chattel was in such State when the mortgage was created by its owner in another, and if recording is required in the state where the attachment is made.¹ The proceeding by attachment to condemnation, in Illinois, of chattels there, which had been mortgaged in New York, was held good, with precedence over the mortgage in the case of Green just cited. And the title of the purchaser was declared retroactive to the date of the seizure, and to be free from all liens unrecorded in Illinois at that time.

Attachment lien outranks an execution of later date;² and it is held that title resulting from a seizure with a subsequent judgment confirming attachment is better than one emanating from an older judgment if the older be posterior to the levy of the attachment.³

Curiously enough, seizure under attachment process and the right to seize, come into existence at the same moment. There can be no right to seize where there is no *jus ad rem*; and there is no *jus ad rem* before seizure, since the act of attaching creates the lien.⁴ Public policy makes an exception here to the general rule, and allows a creditor to proceed as though he had a lien, under the liability to have his labor for his pains, in case the officer should find nothing upon which to place the hypothetical right, or in case the court should hold the allegations of the petition and affidavit to be unsupported by proof at the trial.

¹ Green v. Van Buskirk, 5 Wall. 307 and 7 Wall. 139; Hardaway v. Semmes, 38 Ala. 657.

² Beck v. Brady, 7 La. Ann. 1; Goore v. McDaniel, 1 M'Cord, 480; Harbison v. McCarty, 1 Grant, 172; Stockley v. Wadman, 1 Hous. (Del.) 350.

³ Martin v. Dryden, 6 Ill. 187; Baldwin v. Leftwich, 12 Ala. 838; Redus v. Wofford, 4 Smedes & M. 579; Tappan v. Harrison, 2 Humphreys, 172; Oldham v. Scrivener, 3 B. Monroe, 579.

⁴ Fitch v. Waite, 5 Conn. 117; Gates v. Bushnell, 9 Id. 530; Sewell

v. Savage, 1 B. Monroe, 260; Nutter v. Connett, 3 Id. 199; Zeig-nhagen v. Doe, 1 Ind. 296; Tafts v. Manlove, 14 Cal. 47; Kuhn v. Graves, 9 Ia. 303; Stockley v. Wadman, 1 Hous. (Del.) 350; Pond v. Griffin, 1 Ala. 678; Haldeman v. Hillsborough and Cin. R. R. Co., 2 Handy, 101; Crowninshield v. Strobel, 2 Brevard, 80; Robertson v. Forrest, Id. 466; Bethune v. Gibson, Id. 501; Crocker v. Radcliffe, 3 Id. 23; McBride v. Harn, 48 Iowa, 151; Stiles v. Davis, 1 Black, 101; Kennedy v. Brent, 6 Cr. 187; Hacker v. Stevens, 4 McL. 535.

Prior to the service of the writ, therefore, there is no *jus ad rem* in existence, nor any certain to arise; and therefore, the mere institution of the proceedings and issuance of the attachment, neither affects the debtor's property, nor the rights of others therein.¹ It follows, that when title to property, coming from attachment proceedings, is to be settled as to the origin of the lien, we must count, not from the period when the attachment was issued, nor from that when it was confirmed by judgment, but from the day when it was served on the thing, if afterwards confirmed by judgment.² The judgment against the debtor's property refers to the date of the seizure; but it is not meant that the seizure, *ipso facto*, transfers the title from him; for he may still control it, subject to the lien, while the attaching creditor cannot. The latter has not even the right of execution against it by virtue of the mere seizure.³ His alleged right of lien is inchoate before actual attachment. The writ itself, before the actual attachment of some definite thing, is a mere "fishing commission," in the hands of the sheriff or marshal, or some specially appointed officer. And even when something definite has been attached, the lien is not complete.

§ 584. **The Lien Perfected by Judgment Sustaining the Attachment.** Does the creditor, then, by the seizure, acquire no right whatever? He acquires a contingent lien, defeasible only by the dissolution of the attachment,⁴ and susceptible of

¹ *Williamson v. Bowie*, 6 Mumford, 176; *Tomlinson v. Stiles*, 4 Dutcher, 201; *Mears v. Winslow*, 1 Smedes & M. 449.

² *Tyrell v. Rowntree*, 7 Pet. 464; *Brown v. Williams*, 31 Me. 403; *Wilson v. Forsyth*, 24 Barbour, 105; *Am. Ex. Bank v. Morris C. & B. Co.*, 6 Hill (N. Y.) 362; *Brown v. Williams*, 31 Me. 403; *Stephen v. Thayer*, 2 Bay, 272; *Martin v. Dryden*, 6 Ill. 187; *Redus v. Wofford*, 4 Smedes & M. 579; *Tappan v. Harrison*, 2 Humphreys, 172; *Lackey v. Seibert*, 23 Mo. 85; *Hannahs v. Felt*, 15 Ia. 141; *Cockey v. Melne*, 16 Md. 200; *Bagley v. Ward*, 37 Cal. 121; *Loubat*

v. Kipp, 9 Fla. 60.

³ *Wheeler v. Nicholls*, 32 Me. 233; *Grosvenor Admr. v. Gold*, 9 Mass. 209; *Bigelow v. Willson*, 1 Pickering, 485; *Denny et al. v. Willard*, 11 Id. 519; *Fettyplace et al. v. Dutch*, 13 Id. 388; *Arnold v. Brown*, 24 Id. 89; *Goddard v. Perkins*, 9 N. H. 488; *Calkins v. Lockwood*, 17 Conn. 154; *Willing v. Bleeker*, 2 S. and Rawle, 221; *Foulks v. Pegg*, 6 Nevada, 136.

⁴ *Murray v. Gibson*, 2 La. Ann. 311; *Ward v. McKenzie*, 33 Tex. 297; *Peck v. Webster*, 7 How. (Me.) 658; *Lackey v. Seibert*, 23 Mo. 85; *Desha v. Baker*, 3 Ark. 509; *Frellson v. Green*, 19 Id. 376; *Hannahs v. Felt*,

being matured to a fixed or perfect lien.¹ It will be found, upon critical examination of seemingly conflicting authorities, that their reconciliation lies in this true proposition: That an attachment on *mesne process* creates a hypothetical *jus ad rem* susceptible of being rendered perfect from the date of seizure by the retroactive effect of a judgment sustaining the attachment. Upon this proposition, the supposed conflict of opinion between Mr. Justice STORY, of the one part, and the courts of Massachusetts, New Hampshire and New Jersey, on the other, may be reconciled.² Herein may be found, too, the solution of the problem, whether the attaching creditor may have his lien protected against subsequent encumbrances and fraudulent conveyances of the thing attached; for, by the law of relation, the retroaction ranks the lien above subsequent encumbrances, and avoids all transfers that are to its detriment, following the property with those transfers that are valid.

The hypothetical right in the thing seized is precisely the same, whether the *res* be tangible or intangible; and therefore, when the debtor of the debtor has been reached by garnishment, the lien against any sum adjudged due by him becomes perfect when the attachment is confirmed by decree; but there is no general lien, against the garnishee's property, of contingent character susceptible of being matured by final judgment.³

The lien is confined to the debt acknowledged by the garnishee to be due or becoming due to the seizing creditor's debtor, and adjudged by the court so to be. The fact of the existence of such lien against such intangible *res* is made apparent by the attempt of a junior writ of attachment to reach and outrank the senior. Though the garnishee is not an interested party litigant in the suit, (the courts are fond of styling him "a mere stake holder,") yet he is such so far as to

15 Iowa, 141; *Martin v. Dryden, 6 Ill. 187; The People v. Cameron, 7 Id. 468; Goore v. McDaniel, 1 McCord, 480; Smith v. Bradstreet, 16 Pick. 264; Van Loan v. Kline, 10 Johns. 129; Davenport v. Lacon, 17 Conn. 278.

¹ Fisher v. Vose, 3 Rob. (La.) 457;

Foster's Case, 2 Story, 131; Bellows and Peck's Case, 3 Id. 428.

² Davenport v. Tilton, 10 Metcalf, 320; Kittredge v. Warren, 14 N. H. 509; Buffum v. Seaver, 16 Id. 160; Vreeland v. Brown, 1 Zab. 214.

³ Parker v. Farr, 2 Browne, 331.

become subject to the order to pay over what he owes; and he is liable to be mulct in various ways, if not straightforward in his course. He is liable, too, to be unjustly harassed, when his indebtedness to the creditor's debtor is not well defined, subject to contingencies, etc.

When tangible things are seized in his hands, there seems to be no difference, (as to the creation of the lien,) from the case when they are taken from the owner.

The power of government to create a *jus ad rem* where none existed before, upon such property as may be attached, when all the debtor's property is the common pledge of his creditors, will be found strongly entrenched in public policy. It is one of the inherent duties of government to afford remedy to the creditor in collecting from his debtor; and it is one of the proper means of affording the remedy, to give the first attaching creditor the preference as to rank of lien. "The law favors the vigilant."

§ 585. **Information Against Property.** The declaration and affidavit together should contain such allegations virtually against the thing to be attached as would be sufficient in a libel of information against such thing, in the usual action *in rem*, if the proceedings are to be treated as belonging to that class of actions. Evidently, it matters not whether the creditor's allegations be styled a declaration, a petition, a complaint or an information, if the requisite charges against the thing defendant are made. Begun usually like a personal action, the initiatory pleading is usually called a declaration, in States where that term is applied to allegation against personal debtors; or a petition, where that term is preferred; but, just so soon as the cause is limited to the property of the debtor, we must look to those allegations to see that they, eked out by the affidavit, convey to the mind the idea that the debtor's property is the thing primarily bound, out of which the money due the creditor is sought to be made. Superfluous matter may be thrown away; allegations that would have concerned the debtor alone, had he appeared, may be construable against his property, and the necessary charges may be evolved. But, if, (with the liberal interpretation of such double-faced allegations, which the courts

allow in attachment suits,) charges against the thing sought to be seized are not substantially made out, there ought to be no lien recognized and no condemnation of the *res*.

In a matter so indefinite as the pleading in an attachment case, begun as a case *in personam*, yet becoming one *in rem* by reason of the debtor's not responding to publication notice, it is difficult to be explicit. As to the original declaration or petition, with the affidavit; and as to its character as an information against property, the reader will have to consult judicial expositions.¹ And the affidavit must always be considered, as part of the necessary charge against the *res*.²

§ 586. **General Statutory Requirements.** As the grounds of attachment are purely statutory, the pleader must look for them in the enactments of his own particular State. There are some grounds, however, common to all the statutes of the different States, or nearly so; and these will be sufficiently illustrative for the general purposes in view. The prevailing causes of action by attachment are that there is debt due; that the debtor has absconded or is about to abscond; that he conceals himself to avoid being personally sued; that he is absent permanently from the State or is about to be so, but that he has property within the State liable to be seized in execution which the creditor fears will be removed from the State before he can get judgment, or fraudulently conveyed, etc.

Such grounds must be pleaded and attested by oath, with a statement of the amount of indebtedness, and all the usual requisites. As the Supreme Court said, in the case with which we began this chapter, "If the defendant appears, the case be-

¹ *Simpson v. Burch*, 4 Hun. 315; *Seaver v. Fitzgerald*, 23 Cal. 85; *Sueterlee v. Sir*, 25 Wis. 357; *Mackubin v. Smith*, 5 Min. 367; *Harrington v. Loomis*, 10 Id. 366; *Gemmell v. Rice*, 13 Min. 400; *Byrne v. Robert*, 31 Iowa, 319; *Ogden v. Walters*, 12 Kans. 282; *Dietrich v. Lang*, 11 Kans. 636; *King v. Harrington*, 14 Mich. 532; *Van Wyck v. Hardy*, 4 Abb. App. Dec. 496; *Stienle v. Bell*, 13 Abb. Pr. N. S. 171; *Bixby v.*

Smith, 49 How. Pr. 50. (S. C. 5 Thompson & C. 279.) *Drouillard v. Whistler*, 29 Ind. 552.

² *Merrill v. Montgomery*, 25 Mitch. 73; *Bardsley v. Hines* 33 Iowa, 157; *Schell v. Leland*, 45 Mo. 289; *Estbrook v. Estbrook*, 64 Barb. 421; *Waffle v. Goble*, 53 Barb. 517; *Spiers v. Halstead*, 71 N. C. 209; *Claypole v. Houston*, 12 Kansas, 324; *Riley v. Nichols*, 1 Heisk. 16; *Bruley v. Seaman*, 30 Cal. 610.

comes mainly a suit *in personam*," we always find, in attachment declarations well drawn, sufficient to charge the debtor: but may we not also find enough to substantially charge the property? The making of the money out of the property is the prominent idea of the creditor's pleading; the allegation of the existence of property, tangible or intangible, is absolutely necessary to the sense of the proceeding, though no article may be specified; the *attachment* or seizure of such property is the *sine qua non* of the declaration; the lien to be created by the attachment prayed for, is the very object of the proceeding against the thing; for that against the person would prove of no avail, if the thing were left susceptible of being sold or encumbered by him to the prejudice of the creditor.

These necessary allegations of the declaration and affidavit combined, constitute substantially the charge that the *res*, sought to be seized, is primarily indebted, (provided it be seized,) to the creditor to such amount of the indebtedness as may equal the value of such thing.

There is little hesitancy, therefore, in concluding that, so far as concerns the *information*, it may find its equivalent in well-drawn attachment declarations and affidavits, if we bear in mind that the prospective character of the primary responsibility is the exceptional feature to the general rule of proceedings *in rem*, but a feature allowed by attachment laws.

§ 587. **Pleadings Should Follow the Statutes.** No court has any jurisdictional right to issue the writ of attachment, unless the statutory requirements be complied with, and the grounds laid in the pleadings;¹ and where there are fatal defects in the declaration and affidavit, the attachment thereunder is void *ab initio*;² and any judgment confirming any supposed lien therefrom assumed, is *coram non judice*; and any execution of such judgment may be disregarded in a collateral action, since

¹ *Beach v. Botsford*, 1 Doug. (Mich.) 199; *Le Roy v. E. Saginaw R. R. Co.*, 18 Mich. 233; *Watkins v. Wallace*, 19 Mich. 74; *Parker v. Walrod*, 16 Wend. 517; *Earl v. Camp*. Id. 562.

² *Matthews v. Densmore*, 43 Mich. 461; *Buckley v. Lowry*, 2 Mich. 418; *Watson v. Arnold*, 5 Id. 98; *Cross v. McMaken*, 17 Id. 515; *Sharpless v. Zeigler*, 92 Pa. St. 467.

the whole proceedings would be not merely voidable but absolutely void.

The pleader need not follow the statute *verbatim*, for it is sufficient if he preserve its sense, when laying the grounds.¹ He must make proof, beyond the affidavit, to the satisfaction of the court, before the latter's issuance of the writ, if the statute of the State requires it.² The sufficiency of proof, preliminary to the granting of the writ, is to be ascertained from the requirement of the particular statute—some States exact of the creditor an oath as to his belief of the facts—some the reasons for his belief—some, additional corroborative testimony.³

One good ground well pleaded, though others be bad, false, or wrongly pleaded, will be sufficient to support the attachment of the property.⁴ The allegation of two grounds, in the alternative, has been held bad, if either is an insufficient ground;⁵ but, it has also been held that if both be sufficient, the disjunctive averment would necessarily be good,⁶ as in libels of information in confiscation cases;⁷ and those decisions which hold or intimate that two good grounds for attachment cannot be pleaded alternately, seem to be erroneous.⁸

¹ *Parmelee v. Johnson*, 15 La. 429; *Sawyer v. Arnold*, 1 La. Ann. 315; *Cross v. McMaken*, 17 Mich. 511; *Ware v. Todd*, 1 Ala. 199; *Graham v. Ruff*, 8 Id. 171; *Wiltse v. Stearns*, 13 Iowa, 282; *Mandel v. Peet*, 18 Ark. 236; *Kennon v. Evans*, 36 Ga. 89; *Boyd v. Buckingham*, 10 Humphreys, 434; *Bank of Alabama v. Berry*, 2 Humphreys, 443; *Commercial Bank v. Ulman*, 10 Smedes & M. 411; *Dandridge v. Stevens*, 12 Id. 723; *Lee v. Peters*, 1 Id. 503; *Wallis v. Wallace*, 6 How. (Miss.) 254.

² *Vosburgh v. Welch*, 11 Johns. 175.

³ *Matter of Fitch*, 2 Wendell, 298; *Tallman v. Bigelow*, 10 Id. 420; *ex parte Haynes*, 18 Id. 611; *Smith v. Luce*, 14 Id. 237; *Matter of Brown*, 21 Id. 316; *ex parte Robinson*, Id. 672; *Matter of Faulkner*, 4 Hill (N. Y.) 598; *Matter of Bliss*, 7 Id. 187;

Pierse v. Smith, 1 Minn. 82; *Morri-son v. Lovejoy*, 6 Id. 183.

⁴ *McCollem v. White*, 23 Ind. 43.

⁵ *Hagood v. Hunter*, 1 McCord, 511; *Davis v. Edwards*, Hardin, 342; *Barnard v. Sebre*, 2 A. K. Marshall, 151.

⁶ *Commercial Bank v. Ulman*, 10 Smedes & Marshall, 411; *Cannon v. Logan*, 5 Porter, 77; *Wood v. Wells*, 2 Bush, 197; *Hardy v. Trabue*, 4 Id. 644; *Conrad v. Magee*, 9 Yerger, 428; *Goss v. Gowing*, 5 Richardson, 477; *Hopkins v. Nichols*, 22 Tex. 206; *Bosbyshell v. Emanuel*, 12 Smedes & M. 63; *Van Alstyne v. Erwine*, 1 Kernan, 331; *Kleuk v. Schwalm*, 19 Wis. 111.

⁷ *The Confiscation Cases*, 20 Wall. 106.

⁸ See *Devall v. Taylor*, Cheves, 5; *Jewel v. Howe*, 3 Watts, 144; *Wray v. Gilmore*, 1 Miles, 75; *Culbertson*

There is no good reason that can be conceived why the established rule, that in all proceedings *in rem*, (they being always necessarily civil proceedings,) alternate allegations against things may be made when each of the disjoined allegations is sufficient in itself,¹ should not be applied to attachment proceedings against things.

But here is the test: if alternate allegations render the ground of issuing the writ doubtful, they are fatal. Neither by use of the disjunctive "or" nor by any other word or phrase, will uncertainty be justifiable, as to the required fact or facts. The information against the *res* must be stated with absolute certainty.²

Allegations may be certain and good as to one of two joint debtors but not as to the other. If, in any State, the statute does not require a statement as to how the debt accrued, it need not be stated. The amount claimed must be correctly set forth.

§ 588. **The Affidavit.** The affidavit must be made by one authorized to make it, whether the plaintiff himself or some one who, under the statute, may appear in his stead. In all attachment actions which take the character of proceedings *in rem*, the affidavit should appear of record to show the jurisdiction. The time of the filing of the affidavit is before the issuing of the writ. The importance of the affidavit appears from the decisions of the courts to the effect that, if it does not show any of the legally required grounds for the attachment, all subsequent proceedings are void for want of jurisdiction, and the judgment *coram non jure*.³ And since such affi-

v. Cabeen, 29 Tex. 247; *Guile v. McNanny*, 14 Minn. 520; *Stacy v. Stichon*, 9 Iowa, 399; *Hawley v. Delmas*, 4 Cal. 195.

¹ *The Emily and Caroline*, 9 Wheaton, 381; *The Caroline*, 7 Cranch, 496, note; *Jacob v. The United States*, 1 Brockenbrough, 520; *Cross v. United States*, 1 Gal. 31; 2 *Parsons on Admiralty*, 383.

² *Munroe v. Cocke*, 2 Cranch C. C. 465; *Quarles v. Robinson*, 1 Chandler, 29; *Jacoby v. Gogell*, 5 S. &

Rawle, 450; *Friedlander v. Myers*, 2 La. Ann. 920.

³ *In re Faulkner*, 4 Hill, (N. Y.) 598; *in re Bliss*, 7 Id. 187; *Buckley v. Lowry*, 2 Mich. 418; *Wilson v. Arnold*, 5 Id. 98; *Whitney v. Brunette*, 15 Wis. 61; *Clark v. Roberts*, 1 Illinois, 222; *Smith v. Luce*, 14 Wend. 237; *ex parte Haynes*, 18 Id. 611; *ex parte Robinson*, 21 Id. 672; *Caldwell v. Colgate*, 7 Barbour, 253; *McCulloch v. Foster*, 4 Yerger, 162; *Conrad v. McGee*, 9 Id. 428; *Maples*

davit is necessary to the jurisdiction, it must appear of record.¹

Though no particular *res* is contemplated by the plaintiff when he files his declaration against the debtor; though then the seizure is entirely prospective, yet when property is found by the officer and levied upon under the writ of attachment, it is as though the affidavit upon which the writ was issued had had reference to that particular *res*; the thing found must be conceived to be that thing which the creditor had in mind when he provoked the issuance of the writ.

Under the hypothesis assumed, the law must contemplate the allegations which bear upon the subsequently attached *res* to have been filed *nunc pro tunc*; and all the allegations which do not so bear, to be mere superfluous matter. If the allegations which bear upon the *res* prove sufficient to charge the primary responsibility upon it as an indebted thing, there would seem to be nothing fatal in the fact that they were made prospectively, under the practice as it has long existed, and under the law of attachment, as it has long been understood and expounded.

§ 589. **The Seizure.** Attachments are governed by the general principles governing all seizures, (so far as applicable,) which we have already discussed.²

The officer's authority to attach continues till the return day of the writ, though there may have been an intermediate endorsement, "no property found."³ Seizure after the return day has been held void as to others than the owner;⁴ but, if the owner should make no disposition of the *res* by either sale or encumbrance before judgment against him, the seizure after

v. Tunis, 11 Humphreys, 108; *McReynolds v. Neal*, 8 Id. 12; *Endel v. Siebrock*, 33 Ohio St. 254; *Calkins v. Johnson*, 20 Id. 539; *Adams v. Jeffries*, 12 Ohio, 253; *Moore v. Starks*, 1 Ohio State, 369; *Belmont v. Cornen*, 82 N. Y. 256; *Howe Machine v. Pettibone*, 74 N. Y. 68; *Scofield v. Doscher*, 72 N. Y. 491.

¹ *Conrad v. McGee*, 9 Yerger, 428;

Staples v. Fairchild, 3 Comstock, 141; *Maples v. Tunis*, 11 Humphreys, 108; *Shrivers v. Wilson*, 5 Harris & Johnson, 130. But see *Biggs v. Blue*, 5 McLean, 148.

² Ante, Book I., chap. v.

³ *Courtney v. Carr*, 6 Iowa, 238.

⁴ *Peters v. Conway*, 4 Bush, 566; *Dame v. Fales*, 3 N. H. 70.

the return day would have effected its purpose as to him, since a judgment lien would then arise. But this, we know, is not meeting the question, whether attachment after the day fixed in the writ for the return, would be good as to the debtor owner of the thing attached. The better view seems to be that third persons may acquire rights *in* or *to* the property from him, after such tardy attachment, superior to those acquired by the attaching creditor—which is answering the question in the negative.

Publication, before the return showing seizure, has been held good¹ in Michigan; but it has been said, in that State, that even after the levy, the actual possession of the property remained in the debtor.²

It is deemed the duty of the seizing officer to attach enough of the debtor's property to satisfy the alleged debt, if enough can be found;³ and, on the other hand, he should not take so much in excess of a sufficiency as to injure the debtor. He is between two fires, as it were; liable to be mulct in damages if he err either way.⁴ The statutes give him some protection from the creditor by means of an indemnifying bond which he may exact under certain circumstances. Whether indemnified or not, he is bound to obey the plaintiff's reasonable instructions as to the manner and matter of the attachment,⁵ and he would be liable should the plaintiff suffer by an unjustifiable delay in the levy of the writ.⁶ If he should fail to seize any attachable property, he is liable in damages, to the creditor plaintiff:⁷ if he should seize any that is not attachable, he is liable as a trespasser to whom the trespass may concern.⁸

¹ *Watson v. Toms*, 42 Mich. 561; *Miller v. Babcock*, 29 Mich. 526.

² *Schall v. Bly*, 43 Mich. 402; *Smith v. Collins*, 41 Id. 173.

³ *Fitzgerald v. Blake*, 42 Barbour, 513; *Ransom v. Halcott*, 18 Barbour, 56; *Howes v. Spicer*, 23 Vt. 508.

⁴ *Barrett v. White*, 3 N. H. 210; *Taylor v. Jones*, 42 Id. 25; *Peeler v. Stebbins*, 26 Vt. 644.

⁵ *Ranlett v. Blodgett*, 17 N. H. 298. See *Drake v. Hale*, 38 Mo. 346.

⁶ *Kennedy v. Brent*, 6 Cr. 187. See

Whitney v. Butterfield, 13 Cal. 335.

⁷ *Stickney v. Davis*, 16 Pick. 19.

⁸ *Cooper v. Newman*, 45 N. H. 339; *Foss v. Stuart*, 14 Me. 312; *Richards v. Doggett*, 4 Mass. 534; *Gibson v. Jenney*, 15 Id. 205; *Howard v. Williams*, 2 Pick. 80; *Bean v. Hubbard*, 4 Cush. 85; *Lynd v. Pickett*, 7 Minn. 184; *Caldwell v. Arnold*, 8 Id. 265; *Woodbury v. Long*, 8 Pick. 543; *Ford v. Dyer*, 26 Miss. 243; *Meade v. Smith*, 16 Ct. 346; *Sangster v. Commonwealth*, 17 Grattan, 124; *Van*

The seizure under attachment writ is not necessarily void by reason of irregularities, and excess of quantity seized, even amounting to trespass, on the part of the officer; for, while he may be liable for such excess, the plaintiff is not to lose his hold upon that which is fairly covered by the writ.¹ But the attachment may be set aside for fraud on the part of the plaintiff in effecting the seizure.²

§ 590. **The Res Should be Certain.** When an attachment case assumes the character of an action *in rem*, it is absolutely essential that the thing seized and made defendant should be a *certain* thing. If the seizing officer seizes personal property and takes it into his possession, and produces it when required, a less particular description might serve the purposes of his return than when the seizure is of something which he cannot physically take in hand, as land or an intangible *res*; but in all cases, the identity of the thing seized with that condemned to pay and brought under final execution, must clearly be made to appear. If a certain quantity of goods be returned as attached, and there prove to be a less quantity, the attachment is, as a matter of course, not good to the amount of the stated quantity.³ And the goods must be seized as the property of the defendant and so returned.⁴

In the attachment of real estate, where the action turns against it alone, the importance of a certain description becomes very apparent, though courts have not always so seemed to think. Manifestly, the return to the seizure should not only

Pelt v. Littler, 14 Cal. 194; *Archer v. Noble*, 3 Me. 418; *Harris v. Hanson*, 11 Id. 241; *State v. Moore*, 19 Mo. 369; *Commonwealth v. Stockton*, 5 Monroe, 192; *People v. Schuyler*, 4 Com. 173; *Gibbs v. Chase*, 10 Mass. 125; *Miller v. Baker*, 1 Met. 27; *Morse v. Hurd*, 17 N. H. 246; *Paxton v. Steckel*, 2 Pa. State, 93.

¹ *Merrill v. Curtis*, 18 Me. 272.

² *Powell v. McKee*, 4 La. Ann. 108; *Paradise v. Farmers' Bank*, 5 Id. 710; *Wingate v. Wheat*, 6 Id. 238; *Myers v. Myers*, 8 Id. 369; *Gilbert v. Hollinger*, 14 Id. 441; *Deyo v. Jennison*,

10 Allen, 410; *Timmons v. Garrison*, 4 Humphreys, 148; *Metcalf v. Clark*, 41 Barb. 45; *Pomroy v. Parmlee*, 9 Iowa, 140; *Nason v. Esten*, 2 R. I. 337.

³ *Haynes v. Small*, 22 Me. 14; *Clarke v. Gary*, 11 Ala. 98.

⁴ *Clay v. Neilson*, 5 Randolph (Va.) 596; *Mason v. Anderson*, 3 Monroe, (Ky.) 293; *Anderson v. Scott*, 2 Mo. 15; *Rapine v. McPherson*, 2 Kan. 340. But, *vide contra*, *Johnson v. Moss*, 20 Wend. 145; *Bickerstoff v. Patterson*, 8 Porter, 245.

give the metes and bounds of real estate but should further describe it as the property of the debtor, since it is that fact which must give the primary responsibility to the attached *res*, if it be given at all.

§ 591. **Description.** The decisions, however, are not uniform on this point. An attachment of real estate was held in Texas to be voidable because, among other reasons, the return had not shown the property seized to be that of the alleged debtor in the attachment proceedings;¹ but in Alabama it was held that where property was seized it must be presumed that the officer seized it as that of the debtor, pursuant to the mandate;² and there has been similar ruling in Mississippi.³ In Maine, where the averment of the debtor's proprietorship was doubtfully stated in the return, it was considered sufficient;⁴ and in Wisconsin, when property was erroneously returned as belonging to one debtor while it belonged to another, it was thought a sufficient return, not vitiating the proceedings so as to affect final execution against the real owner.⁵ Iowa does not appear to have been uniform on the subject.⁶

Certainty of description of land, as to quantity and metes and bounds, has not been more insisted upon by the courts, than its description as to proprietorship. In Indiana, where the seizure was of one-half of a designated lot, without stating which of the two halves was seized, and without stating that it was one-half interest in an undivided lot, the court held the attachment to be void for uncertainty.⁷ In Texas, "Lot No. 5 in Block No. 12," was held insufficient description;⁸ but would it not have been sufficient, if a legally adopted plan had been referred to, containing but one block of that number, and but one "Lot No. 5," in that block?

In Missouri, an attachment of the undivided interest of the defendant in the south half of the southeast quarter of section

¹ Menley v. Zeigler, 23 Tex. 88.

² Lucas v. Godwin, 6 Ala. 831.

³ Saunders v. Columbus Ins. Co., 43 Miss. 583.

⁴ Bannister v. Higginson, 15 Me. 73.

⁵ Robertson v. Kinkhead, 26 Wis. 560.

⁶ Rowan v. Lamb, 4 Greene, 468. But, vide contra, Tiffany v. Glover, 3 Id. 387.

⁷ Porter v. Byrne, 10 Ind. 146.

⁸ Menley v. Zeigler, 23 Tex. 88.

seventeen, township fifty-seven, range thirty-five, containing eighty acres, was held insufficient, since the land had been cut up into city lots, with portions devoted to public use for streets; and the court said that the description of the original levy should have described the property with certainty, as in a sheriff's deed.¹

In Maine, the attachment of all the defendant's right, title and interest in and to any real estate in a designated county, was held void for uncertainty.²

On the other hand, in New Hampshire, the return that the defendant's interest "in the farm he lives on" had been attached, was thought sufficient;³ and, in Massachusetts, all the defendant's interest in a certain parcel of land on Pleasant street, Boston,⁴ was sustained as sufficient description of the intangible *res*; and, in the same State, where the attachment was that of a tangible *res*, when there was no further description than "the homestead farm of the defendant," with the mistake, as to quantity, of stating that farm to contain "about thirty acres, more or less," when there were really just five times that number of acres.⁵

Sufficient has been shown to make it apparent that the State courts have not settled the question⁶ as to the absolute certainty necessary in attachments where the proceedings are to go on against a *res* as the defendant. Most of the cases are really suits *in personam* with a prayer for a privilege upon the property attached; and, where the judgment is a personal one against the debtor, and the property is seized under a writ of execution, after judgment, it matters little, between the plaintiff and the defendant, what was the description of the property, in the sheriff's return upon the attachment writ.

§ 592. **Importance of Description When the Case is In Rem.**
When there is no personal judgment and when there can be

¹ Henry v. Mitchell, 32 Mo. 512.

² Hathaway v. Larabee, 27 Me. 449.

³ Howard v. Daniels, 2 N. H. 137.

⁴ Whitaker v. Sumner, 9 Pick. 308.

⁵ Bacon v. Leonard, 4 Pick. 277.

⁶ See, further, Crosby v. Allyn, 5 Me. 453; Taylor v. Mixer, 11 Pick. 341; Lombard v. Pike, 33 Me. 141; Pratt v. Wheeler, 6 Gray, 520; Fitzhugh v. Hellen, 3 Harris & Johnson, 206.

none, the description of that which stands in court as the defendant by fiction of law, becomes of the first importance; and when real estate is that thing, there must be the same certainty as in a mortgage act or a title deed. If, in a mortgage act, certainty is necessary to show upon what the mortgage lien is placed, so in the fixing of the attachment lien, certainty is necessary to show upon what it is made to rest. If in a title deed, the metes and bounds and the name of the vendor should appear for precision sake, how can it be said that the basis of a title from attachment, (*id est*, the levy of the attachment,) should not be equally explicit?

All arguments, drawn from public policy, proving the necessity of perfect accuracy in real estate descriptions where the property passes from one to another, may with propriety be transferred to establish such necessity in attachments and official returns upon the writs.

If, indeed, between the creditor and the debtor, there should be little danger from an inadequacy of description, (seeing that the latter has little to complain of, if his debt has been paid out of his property, however described,) yet the public has an interest in having land titles clear; third persons are interested in knowing what is seized in any given case; and, especially, the purchaser at the sale of the land, after judgment in the attachment suit, is entitled to know that the thing he buys is that which was duly seized and condemned as an indebted thing when there could be no judgment against its owner.

In the seizure of personal property, there is no necessity that the owner's name should be made a part of the description. The name is not necessary to the validity of proceedings, even against real estate, when seized as forfeited.

In a proceeding *in rem* in Michigan, against personal property belonging to some person or persons unknown,¹ there was condemnation to pay a lien, rendered by the Circuit Court; but the Supreme Court reversed the judgment for want of allegation that the *res* was in the county where the suit was instituted. The return of the seizing officer should have shown the place

¹ Two Hundred Thousand Feet of Logs, 43 Mich. 356.

of seizure; and, if the *res* was not within the jurisdiction, of course there could have been no procedure *in rem*. A claimant appeared; but the court could, of course, render no personal judgment against him, in such proceedings, for the amount claimed by the libellant. The Supreme Court said that, after his appearance, all the subsequent proceedings might have been as in actions of assumpsit, and that § 1663 of the Compiled Laws seemed to contemplate such course: from which it may be inferred that the court looks upon cases of the kind as similar to an attachment which the United States Supreme Court said, (in *Cooper v. Reynolds* and other cases,) is *in rem*, if no claimant responds to notice, but *in personam*, if one responds.

§ 593. **Notice.** Given, that the action is *in rem*, with notice both constructive and restrictive—the restriction confining it to the debtor owner—is such notice of any importance?

Nothing can excuse the want of notice but the presumption of law that the owner of property knows when it is in the adverse possession of another; and that, therefore, the seizure of property is notice to the owner from whom it is taken. The excuse cannot be wider than that presumption: therefore, when the debtor's property is attached in the hands of third persons and taken from their possession; especially, when sums due him are garnisheed in the hands of third persons, how can he be presumed to have notice by reason of the seizure?

The opinion prevails that where the statute of any State requires published notice upon failure of summons, such publication should be made, but that where there is no such statute requirement, there need be no constructive notice by publication. The distinction between seizing from the debtor and seizing from third possessors has been left out of view, as well as all question of the constitutional right of the statute makers to take one's property without his knowledge, constructive or otherwise.

Nobody would contend that, in any personal action, courts could adjudge against a man without his knowledge, or that legislators could authorize them to do so; yet, such is the mud-dle into which attachment proceedings have been placed, that it is not uncommon to find decisions treating notice as of no

value generally, and only to be resorted to for the purpose of complying with express statute requirements, even where the seizure is that of property in the hands of garnishees.¹

§ 594. **Essential to the Jurisdiction.** How can the court have jurisdiction of a thing taken from the possession of a third person without even constructive notice to the owner? Jurisdiction being the power to hear and determine, how can a court hear the personified *res* when its absent owner is not notified by seizure from him nor by published monition?²

Sometimes personal citation of the owner of a *res*, living not in the State of the seizure, has been resorted to, as a substitute to notice by publication.³ This would be restricted notice, at best; and, if it may take the place of a published monition, it would still be difficult, if not legally impossible, for the court having jurisdictional custody of the *res*, to thus reach such owner.⁴

It has been said that "when notice to the defendant by publication is required, it is not an element of the jurisdiction of the court, but is necessary to authorize the court to exercise its jurisdiction by giving judgment in the cause."⁵ But that which "is necessary to authorize the court to exercise its jurisdiction by giving judgment in the case" is substantially equivalent to "power to hear and determine." There is a marked distinction between jurisdiction and "the exercise of jurisdiction;" but there is none between jurisdiction and "authority to exercise jurisdiction by giving judgment." The latter phrase is precisely the same in meaning as "authority to hear and determine." Therefore, notice to the defendant by publication when required, (and notice of some sort must always be required,) is "an element of the jurisdiction of the court,"

¹ Cochran v. Loring, 17 Ohio, 409; Nat. B'k v. Lake Shore R. R., 21 Ohio State, 221.

² Edwards v. Toomer, 14 Smedes & Marshall, 75; Ridley v. Ridley, 24 Miss. 648; Martin v. Dryden, 6 Ill. 187.

³ Miller v. Davison, 31 Iowa, 435; Bates v. R. R. 19 Iowa, 260; Grant v.

King, 31 Mo. 312; McComber v. Jaffray, 4 Gray, 82.

⁴ Crouch v. Crouch, 30 Wis. 667.

⁵ See, in support of this view, Paine v. Mooreland, 15 Ohio, 435; Williams v. Stewart, 3 Wis. 773; Beech v. Abbott, 6 Vt. 586; Drake on Attachments, § 437

if authority to hear and determine depends upon it, as is conceded by the proposition discussed. Publication of notice was held necessary to the jurisdiction of the court, in Michigan,¹ and also in Maryland,² and also formerly in Ohio,³ and in Mississippi,⁴ and in several other States. See many authorities in Chap. VII., "Notice."

§ 595. **The Opposite View.** But Ohio, in a later case; changed front.⁵ It seems that land was taken from its owner, but the reasoning of the court is not based upon the premise that the seizure from him was notice to him, but on the proposition that seizure gave jurisdiction over the subject matter and over the rights of the debtor without any notice whatever, actual or constructive, real or presumed. Though the Ohio statute required notice by monition in case of the failure of the summons to reach the alleged debtor, the court held that there was power to hear and determine upon the property rights of the owner, without compliance with the statute.

The case in which this doctrine was held, was an ejectment suit brought against Mooreland who had bought at the sale made under the attachment suit in which there had been no notice. The question, as stated by the court, was, "Are the proceedings under the attachment void?" First, the court argues that jurisdiction was vested by the mere levy, from the fact that perishable property levied upon may be sold before the time given for the required notice has expired. But this power of the court is exceptional; it is for the interest of all parties that fruits or other deteriorating property be converted into money, even if it be certain that the attachment must be quashed before trial of the cause. But we deny that the court may order the sale, prior to the time of the return of the notice, except *ex necessitate rei*.

The court asks, "Will it be contended, then, that the court has jurisdiction over perishable property before notice consummated but not over property not perishable?" The answer is, It is not true that the court has jurisdiction over perishable

¹ King v. Harrington, 14 Mich. 532.

² Clark v. Bryan, 16 Md. 171.

³ Warner v. Webster, 13 Ohio, 505.

⁴ Calhoun v. Ware, 34 Miss. 146.

⁵ Paine v. Mooreland, 15 Ohio, 435.

property *to condemn it*. It is by statute authority that courts in Ohio may change perishable property into imperishable cash, but this is a very different matter from jurisdiction over it for the purpose of condemning it to pay its owner's debts. The court cannot condemn the equivalent of the perishable property any more than it can condemn imperishable property, without notice to the debtor owner.

Next, the court said, "A court acquires jurisdiction by its own process. If the process of the court be executed upon the person or thing concerning which the court is to pronounce judgment, jurisdiction is acquired. The writ draws the person or thing within the power of the court; the court once having by its process acquired the power to adjudicate upon a person or thing, it has what is called jurisdiction. This power or jurisdiction is acquired only by its process. To give jurisdiction is the object of the process. The mode of executing or serving process is sometimes directed or permitted to be by notice of publication. All process issues under the seal of the court. Notice by publication is not process, but in certain cases, in contemplation of law, is equivalent to service of process. The process in attachment is the writ authorizing and directing a seizure of the property. No process is issued against the person, because the proceeding is *in rem*."

"The statute, however, regards it but just that notice should be given to the debtor, not for the purpose of giving the court jurisdiction over the subject-matter, but to permit the debtor to have an opportunity to protect his rights, and directs that the writ shall be quashed if it be not given. The distinction is between a lack of power or want of jurisdiction in the court, and a wrongful or defective execution of the power. In the first instance, all acts of the court not having jurisdiction, are void—in the latter, voidable only."

§ 596. **That View Considered.** Is not this the assumption of the point at issue? The question is, Were the proceedings void *quoad* the rights of the debtor? The distinction sought to be drawn between the land and the right of its owner to it, so far as concerns the power of the court over them, is unwarrantable. Therein lies the fallacy. There is no jurisdiction to

divest that right where the owner's opportunity, under the statute, to protect it, is denied. And it follows that, without such opportunity being given by the published notice as required by statute, the court acquired no "power to hear and determine" anything; acquired no jurisdiction over the subject matter: consequently, the judgment was not voidable merely, but absolutely void.

Process gave no jurisdiction when it failed to take hold of the *thing-as-the-property-of-the-debtor*. The case is very different in proceedings *in rem* with universal notice. There all the world are parties, and the seizure of the wrong man's property would hold good, should he not respond to notice and claim it. Should he stand silent, he would soon find himself defaulted. But could the judge in the Ohio attachment suit have defaulted the non-appearing owner? Clearly not, since he was not notified. The assumption of jurisdiction, under the circumstances, was as objectionable as would be that of a judge in an admiralty cause *in rem*, under the revenue or navigation laws, with no publication of general notice, and therefore no power to pronounce default. Collateral actions, under such circumstances, are maintainable; and the suit of Paine against Mooreland ought to have been successful. But, with varying states of facts, there are other decisions which serve to keep it in countenance as it is.¹

To bring this case of *Paine v. Mooreland* within the true rule of void and voidable judgments, there should have been notice upon the debtor-owner of the land in the attachment suit, so as to give the court power to pass upon the *res* with reference to the owner's rights to it, and his liability to pay the alleged debt. With such jurisdiction acquired, there might have been error in its exercise, but an erroneous judgment would not have been void—only voidable.

§ 597. **Custody, not Jurisdiction.** But, with the *res* seized and no notice given, the court had custody of it only—not jurisdiction over it to hear and determine whether or not the

¹ See *Matter of Clark*, 3 Denio, 167; *Beech v. Abbott*, 6 Vt. 586; *Gregg v. Thompson*, 17 Iowa, 107; *Williams v. Stewart*, 3 Wis. 778.

debtor's liability was imputed to it by fiction of law. Such custody would give the court the right to preserve it—a right coupled with the duty, even in the absence of the express statute authorization; for it is a right which all lawful custodians of property possess, since no one could conscientiously see another's wealth waste in his hands, if he could prevent it. But to infer that, because a custodian—judge or private citizen—may convert the perishable goods of another into money to save them, therefore he has power to decide whether it is liable for debt or not, is a *non sequitur* too glaring to escape notice.

Yet the court, by its process, when not attended by notice, gets nothing but the lawful custody. If that is jurisdiction, there might be a hearing and determining on the very day the thing is attached; all goods could be disposed of as well as the perishable, before the absent owner could be heard from, however vigilant he might be in watching the newspapers for such notice, and however anxious he might be to appear. It really seems to us that nothing but the numbers of ill-considered decisions in favor of jurisdiction without notice could make the position respectable.

The court, in *Paine v. Mooreland*, after saying, "A court acquires jurisdiction by its process," admits that the Ohio statute requires service of the process by publication of notice. Did it mean to say that, in such case, a court could acquire jurisdiction by process not served? Did it mean to say that the mere issue of process gives power to hear and determine? Did it mean to say that the arrest of the thing to be attached under the process gives power to hear and determine the rights of the debtor-owner to the thing, and to pass upon his title in the conveyance of it by deed to the purchaser at the sale following the judgment?

It is not true, in any case *in rem*, that courts acquire jurisdiction by the issue of process. It is not true that by the mere arrest of the thing ordered to be attached as an indebted thing, the court acquires any power over it beyond the lawful custody of the thing. The seizure itself is merely a provisional seizure; it is a contestible attachment; it gives no immediate right to condemn or restore. The *res* must be in a condition to be *heard*

before the court can *determine*. And that condition only arises when the real debtor is brought to a knowledge of the situation of the fictitious debtor. And such knowledge is, by the statute, communicated, or presumed to be communicated to the real debtor, by published notice, when he cannot be personally found. Such notice is therefore essential to jurisdiction over the thing to condemn it for debt.

§ 598. **The Unnotified not Bound.** Why are lien holders not divested by attachment proceedings *in rem*? Because they are not notified and not required by any of the statutes to be notified, and the court has no jurisdiction over their rights in the property.

Is it not because their liens are recorded? No, for the same rule applies to holders of silent liens.

Why is the judgment condemning the debtor's property, in attachment proceedings *in rem*, not conclusive upon all the world? Because all the world are not notified and not required by any of the statutes to be notified, and are therefore not parties, and the court has no jurisdiction over their rights in or to the property.

Why is not the same rule applicable to the debtor-owner, (unless the seizure be notice, as when the property is taken from his possession,) when he is unnotified? There is no reason whatever why it should not be so applied.

§ 599. **Notice by Seizure.** In the remarks above on notice and jurisdiction, the case where seizure itself is notice by legal presumption, has been excepted: since, in such case, the levy of the attachment writ, and the giving of such notice, are simultaneous acts; and jurisdiction is the result.

It would be a happy reform, if courts would uniformly draw the line between attachment levies where such presumption exists, and those in which it does not. It would greatly promote the public good. It would be a salutary relief to the legal profession. It would save the courts from much labor and confusion.

In drawing this line, it should be fixed precisely where presumption of knowledge of the levy of attachment ends. Even on the first side of such line, it must be remembered that pre-

sumption of knowledge is obliterated by a statute requiring notice to the owner from whom property is seized. On the other side of it, stand all cases where presumption of knowledge has never existed by law, even where statutes are silent on the subject of notice, as well as all cases in which such presumption is positively overborne by express statute requirement of notice.

Can the debtor be supposed to know when his property is taken from the possession of a third person, not his agent? Can he be supposed to know that debts due him are attached and acknowledged by the garnishee? True, he does know of his own indebtedness, if he is really indebted; but does the law ever presume that he is indebted to the attaching creditor? The fact that the plaintiff has the *onus* upon him to make out his case, shows that the law does not presume such indebtedness. The *prima facie* showing of the plaintiff, by his affidavit, being entirely *ex parte*, does not create such presumption. It is made the ground upon which the preliminary proceedings stand, and the initiatory step towards jurisdiction; but the presumption of the non-indebtedness of the alleged debtor remains as sacred as the presumption of an alleged criminal's innocence, after indictment.

It is true that the debtor does know of his indebtedness, if he is really indebted. But he has a right to his defense of his property. He has the right to set up all legal defenses. He has the right, for instance, to plead prescription, if the debt has been prescribed. He cannot be required to exercise such rights in the absence of the presumption of knowledge of the action brought against his property. The law assumes absence of such knowledge when it requires that he be notified.

§ 600. **Such Notice to Absent, Concealed or Absconding Debtors.** When the debtor is absent from his State; when he is a non-resident of the State in which the attachment proceedings are instituted: when he is abroad, in a foreign country, it would be a very violent presumption should he be assumed to be cognizant of the new state of facts that had arisen by the institution of the attachment suit and the seizure of his property thereunder. It would be the presumption that he knows affirma-

tively at the time of the seizure what must be proved by the plaintiff at a later stage, when the defendant, should he appear, would have the negative of the proposition. Not only as to the alleged indebtedness, but also as to the alleged seizure, would he have the negative: for he has the right to deny that there had been any valid attachment of his property.

Take a strong case—one in which the debtor is charged with concealing himself to avoid being cited, or with being about to remove his goods, or fraudulently to convey them to another to avoid seizure and the honest payment of his just debts. If such preliminary allegations in the affidavit be true, it is quite likely that the debtor knows that there is about to be a movement against his property; but, is the likelihood of his knowledge a legal presumption that he knows? Measured by the gravity of the charges, must be, on the contrary, the presumption of his rectitude. Surely the averment of such serious disposition of the debtor must be followed by proof. When proved, it is clear enough that the debtor not only knew of his indebtedness when the suit was instituted, but also knew of the issue of the process, (or, at least, of the strong probability of its issue,) against his property and against the debts due to himself. But the significant question is, did the sworn allegation of the fact of his concealment, or of his fraudulent attempts or disposition to put away his effects, create, at the time the affidavit was made and the process issued and the attachment levied, a presumption of knowledge of the proceedings? Again the answer is found in the law which requires notice to him. He cannot be presumed to know, for, if so, notice would be altogether a work of supererogation. And the personified *thing* seized cannot be presumed to know, if its mind, which is that of its owner, is required by law to be notified, and is yet not informed: consequently there can be no power to *hear*, nor any to determine—in other words, no jurisdiction over the subject matter.

§ 601. **How Mortgage Foreclosure differs from Attachment with regard to the Necessity of Notice.** If it should be urged that where attachments are confined to contracts as the cause of action, they are analogous to mortgage foreclosures, the difference between two classes of mortgages may be suggested:

that which imports confession of judgment and that which does not. Where mortgage imports confession, there is not a mere presumption of indebtedness but a positive acknowledgment of it by the debtor. He may be considered as in court making confession when the order of sale is issued, (though he has received no notice,) if the mortgage is by authentic act and therefore self proving. There is no analogy whatever between an attachment suit brought upon even a written contract, and the order to foreclose a confessed mortgage. But there is analogy, so far as concerns the question of notice and jurisdiction, between an attachment proceeding upon contract and the action to foreclose a mortgage not importing confession of judgment; and, in both of these, notice is essential.

The idea has somewhat prevailed, at least in some of the State courts,¹ that all persons within the State where the proceeding *in rem* is had, are concluded by the judgment, with or without notice actual or constructive, as the State statute may require; but that those beyond such State are not so concluded, because of a want of jurisdiction over such persons, and not from want of notice. It is needless to add that such views are wholly contrary to the true principles of proceedings *in rem*, and that it is impossible that any court can render any judgment whatever that can be *res adjudicata quoad omnes* without jurisdiction to declare the divestment of all involved rights.

§ 602. **Claim Wanting.** Here is a *hiatus* in the analogy; for, if the owner of the thing attached should respond to the notice, he becomes a personal defendant, and the action is a personal action, according to the practice and the decisions. But, in case he should not respond, the action progresses against the thing as though the debtor were a defaulted person who might have claimed. Is this contradictory attitude of the attaching creditor towards his alleged debtor, fatal to the position that the proceedings are *in rem* when the latter does not appear? Certainly it is exceptional to the general law governing actions *in rem*; but we should be

¹ See *Darrance v. Preston*, 18 Iowa, 342; *Thomas v. Southard*, 3 Dana, 396; *Banta v. Wood*, 32 Id. 469; 475; *Sheldon v. Newton*, 3 Ohio State, 494; *Montour v. Purdy*, 11 Minn. 384.

slow to declare it fatal, in view of the repeated assertions of the State court tribunal, and of the Supreme Court of the United States, in several decisions, particularly that from which we quoted at the beginning of this subject, to the effect that "if the defendant appears, the cause becomes mainly a suit *in personam*, * * * but if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*." It becomes essentially an action *in rem*, it seems, without a possible claimant in the person of the debtor coming as a voluntary party affirmant rather than a party defendant. Of course, others may intervene to set up their rights, as in any personal suit; and, of course, too, a third person may claim the property seized, but their appearance would not change the character of the suit.

§ 603. **Default and Condemnation.** The Supreme Court of the United States, in *Cooper v. Reynolds*, stating the character of judgments generally in attachment suits *in rem*, say: "The judgment of the court, though in form of personal judgment against the defendant, has no effect beyond the property attached in the suit." Let us see what is the character of such a judgment.

It combines both the default of the notified non-appearer, and the condemnation of the *res* to pay as an indebted thing. Ordinarily, default precedes the finding of the facts and the condemnation; but, in attachment suits, there is this peculiarity: the default and condemnation are simultaneous.

The court said the judgment is "in form a personal judgment;" but this is not peculiar, so far as it concerns default, since all judgments by default against non-appearers after notice, in all proceedings *in rem*, even with universal notice, (as in case of revenue actions *in rem*, confiscation cases, proceedings against vessels, etc., under the navigation laws, the slave trade and piracy laws, etc., etc.,) are virtually personal estoppels conclusive against the men who fail to respond to monition.

The absence of the usual form of declaring non-appearers in contumacy and default and taking the allegations *pro confesso*,

has not been held to affect the validity of the virtual default. The form of final judgment, as though it were rendered against the debtor, is overborne by the fact that the judgment has no effect against the debtor beyond the property attached in the suit, not even subjecting him to costs beyond the value of the *res*; and the further circumstances that "no suit can be maintained on such a judgment in the same court or in any other, nor can it be used in evidence in any other proceeding not affecting the attached property," and that "no general execution can be issued for any balance unpaid after the property is exhausted," as the court go on to say, demonstrate very clearly that such judgment, as to the debtor, is precisely like a judgment by default in the *actio in rem* in all its effects and in all its attributes.

It is easily demonstrable that the final judgment is only against the property attached; is really a condemnation of the *res* as an indebted thing. It bears only upon the thing. It can be executed only against the thing.¹ It is not a condemnation of the thing as guilty and forfeited, nor as hostile and confiscated, but as indebted and obligated to pay a certain sum, just as a ship condemned to pay wages to a mariner, or to satisfy a bottomry bond.

Whatever the *res* may prove to be worth after the satisfaction of the debt and costs, must be paid to its owner, just as in any proceeding *in rem* against a thing indebted.

Judgment is preceded by the finding of the facts,² though at a different stage than in ordinary *actiones in res*, for the seizing creditor must make out his case against the thing as fully as he would have been required to sustain it against a debtor had the court taken the course of a suit *in personam*.

¹ *Clymore v. Williams*, 77 Ill. 618; *Fitzsimmons v. Marks*, 66 Barb. 333; *Miller v. Dungan*, 36 N. J. Law, 21; *Livingston v. Smith*, 5 Pet. 89; *Ricketts v. Henderson*, 2 Cr. C. C. 157; *Lincoln v. Tower*, 2 McL. 473; *Westervelt v. Lewis*, 2 Id. 511; *Boyd v. Urquhart*, 1 Sprague, 423; *Warren Manf. Co. v. Etna Ins. Co.* 2 Paine 502.

² *Schall v. Bly*, 43 Mich. 402; *Watson v. Hinchman*, 42 Id. 27; *State Bank of Fenton v. Whittle*, 41 Id. 365; *Horn v. Wayne Co. Judge*, 39 Id. 15; *Brown v. Blanchard*, Id. 790; *Linn v. Roberts*, 15 Id. 443; *Hyde v. Nilson*, 11 Id. 353. But see *Loder v. Littlefield*, 39 Mich. 512.

It is not the practice to resort to the *formula* of condemnation. Judgments, however, though rendered without the use of this form, must be thought by the courts equivalent to decrees of condemnation, since we do not recall any case in which one pronounced in an attachment suit called *in rem*, has been successfully attacked because it was not a technical condemnation of the property attached. The practice has doubtless been loose, but the subjection of the debtor's property to the payment of the debt being the end sought, such form of decree as has resulted in the attainment of that end, could not now be disregarded, and must be deemed as substantially a condemnation of the indebted thing proceeded against, so far as concerns the debtor's ownership of it.

§ 604. **Law of Relation.** To such judgment, the law of relation applies. It takes the decree, by retroaction, to the date when the *jus ad rem* came into existence; it makes that a perfect lien from the time of seizure which had been but an inchoate one prior to the judgment. It does not make a lien coeval with the origin of the debt, for the reason that the statutes all confine the rise of the lien to the time of the seizure of the *res*. This difference between attachment-judgments and judgments in other causes *in rem* is attributable solely to the statutes. Condemnations of things guilty retroact to the time when the guilty *status* was acquired, without reference to the date of arrest; condemnations of things hostile retroact to the time when the hostile *status* was acquired, without reference to the date of the seizure or even of a directory statute authorizing seizure under the *jus gentium*; but, in the important particular, the retroaction of attachment condemnations is precisely the same as in those of guilty and hostile things; and that important particular is *the avoidance of all intermediate transfers and encumbrances*.

Of course, where there is general notice required by law and duly given, all encumbrances in favor of defaulted persons are swept off, whether they were put on before or after the fatal *status* was acquired; and as against appearers, the law of relation stamps with nullity all liens given by one who had no right to give after forfeiture had been incurred and only

waited to be pronounced. The lien created by the attachment, when consummated by judgment, is as old as the seizure, and therefore outranks any junior of its class.¹ Owing to the effect of the limited notice, its vindication by decree does not sweep off senior liens of this class or of any other; for though it may outrank some others, it is not always by reason of the retroaction, but is sometimes by reason of statute preferences. But, invariably, the law of retroaction renders the attachment lien perfect from the date of the seizure, if confirmed by judgment.²

As to the sale of the attached and condemned *res*, the title acquired by the purchaser, and the confirmation of the sale, the analogy holds good with ordinary proceedings *in rem* where there is only limited notice.

§ 605. **Collateral Attacks Upon Attachment Judgments.** Recurring once more to *Cooper v. Reynolds*, and repeating the language of the Supreme Court of the United States as to the effect of all attachment proceedings to judgment where the debtor does not appear and personally defend: "The case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff," and the judgment "has no effect beyond the property attached in the suit," which may be considered a clear statement of the scope of such judgments: let us now inquire why previous liens are not displaced; and why all subsequent claim to other interests than those seized are not precluded; and why there is nothing more sold than the seized estate of the debtor, by reason of condemnation in an attachment proceeding *in rem*.

The legal reader is ready to answer, "Because of the limited notice." What then would be the effect of a collateral suit brought by one who was not a party to the attachment proceedings, not the alleged debtor, not a third person notified and defaulted, but one who should bring his ejectment suit for the property upon a title alleged to be better than that of the purchaser at the attachment sale?

¹ See *Harrison v. King*, 9 Ohio St. 388, and *Ward v. Howard*, 12 Id. 158, as to whether later attaching credit-

ors may defend against the first attachment.

² *Laird v. Dickerson*, 40 Iowa, 665.

Res adjudicata could not be successfully pleaded against the ejectment suit. The defendant must stand or fall by his title; it would uphold him till the plaintiff should produce a better title, and no longer. And the reason of this is found in the correct statement of the effect of attachment suits *in rem*, quoted from the Supreme Court.

Since such effect is because of the limited notice, (the statutes not authorizing universal notice in attachment suits,) it is confined to proceedings under limited notice, while those under general notice are good against all the world, since "all the world are parties;" and decrees, after general notice, are *res judicata* as to all persons, conclusive against all collateral actions whatever. This we have shown, in its proper place; and have supported by the leading authoritative cases upon the subject.¹

How Mr. Justice STRONG, in view of the Supreme Court's characterization of attachment judgments *in rem*, made not only in the case above mentioned, but in others, (since it is their settled doctrine,) could frame an argument in support of the collateral attack of Micon's heirs² against the decree of condemnation in the case of the *United States v. Benjamin's Two Squares of Ground*, (in which there had been universal notice and default of all persons,) upon the fact that attachment proceedings do not preclude collateral attacks, can only be explained by his failing to see the difference between notice restricted to one man and notice extended to all men. While it is true that by attachment judgments *in rem*, "the interests of others are not cut off or affected," it is not true that in confiscation cases, or any with general notice, "the rights of others are not cut off or affected."

By way of argument, he applied the effect of a decree *in rem* under restricted notice, to a like decree under notice to all persons. Decrees of probate courts against estates of decedents, mortgage foreclosures and attachment judgments were instanced, in all of which, (as we have shown,) the decrees fail to be *res adjudicata* against all persons by reason of their limited notices—notice limited frequently to one person.

¹ Ante, Chapter on Adjudication.

² 9 Wall. 339.

It is as well settled that actions brought upon superior titles, will lie against the purchaser of property under an attachment sale, as it is that they will not lie against the purchaser at a sale under a decree *in rem* after general notice any longer than till the filing of such decree in bar of the collateral action.

The judge admitted that there is a difference, as to the conclusiveness of the decree, between admiralty and revenue condemnations on the one hand; and mortgage, probate and attachment condemnations, on the other; but he failed to see that the difference arises from the notices in the two classes of cases, and that the condemnations which he was considering belonged to the first class.

CHAPTER LVI.

PROCEEDINGS QUASI IN REM.

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§ 606. **The Term.** The meaning of the term *quasi*, when applied to suits, is not very clearly settled. It is not invariably employed by courts and legal writers with any fixed significance. When applied to contracts and offenses, under the civil law, the qualification is not wanting in perspicuity; and, when it was applied to some forms of action under that system, its definition was not difficult. But it seems a vague term here, in our varied practice, because it has been used in different senses.

The various applications may be reduced to two: *First*—When the suit is in form against a person but in effect against a thing: *Second*—When, though not against a thing, it bears upon it and is *as if* against it, though the judgment sought is personal. Mortgage procedure against property well illustrates the first.

§ 607. **Mortgage Suit.** It has been held that a mortgage suit to foreclose by barring the right of redemption is personal; but that so far as it is for the condemnation of property to pay debt, it is *in rem*.¹ Courts, both State and National, have frequently spoken of the mortgage suit, in which there is the object of obtaining an order of sale, as of the latter descrip-

¹ Kershaw v. Thompson, 4 Johns. Chan. 459; Downing v. Palmateer, 1 T. B. Monroe, 64.

tion. Though nominally against persons, such suits are to vindicate liens; they proceed upon seizure; they treat property as primarily indebted; and, with the qualification above mentioned, they are substantially property actions. In the civil law, they are styled hypothecary actions, and their sole object is the enforcement of the lien against the *res*; in the common law, they would be different if chancery did not treat the conditional conveyance as a mere hypothecation, and the creditor's right as an equitable lien; so, in both, the suit is a real action so far as it is against property, and seeks the judicial recognition of a property debt, and an order for the sale of the *res*.

§ 608. **Duality.** The suit is not only personal in form, in all of the States, but it is in effect a dual action, in most of them; for, whether at law or in equity, it results not only in the condemnation of the mortgaged property to be sold, but also in a personal judgment against the debtor for any balance of debt, to be executed against any of his other property, under the statute provisions of the majority of those States which authorize the foreclosure of a mortgage as though it were simply a lien. Only the procedure which is against the hypothecated property can be properly called a real action; that against the debtor to subject his general property to execution is a personal suit, as evidently as is that part of the action which seeks to cut off his equity of redemption. In some of the States, however, any balance of debt is recoverable only by a separate action at law; and there is nothing personal in the equity procedure but the reference to the redemptory feature. Where strict foreclosure is still retained in practice, as it is in a few of the States, the action, though still personal in form, is against a thing to have its forfeiture judicially recognized and declared.

§ 609. **Object of the Mortgage Suit.** Under the civil law, the object is not to declare forfeiture; under the common, strict foreclosure is the process by which title, previously conveyed conditionally, becomes lodged in the mortgagee upon breach of the condition on the part of the mortgagor; but, in chancery, when either the debtor or the creditor so requests, the court directs the sale of the property, and treats the mortgagee as

merely a lien holder. Under either system, therefore, the effect of the decree is substantially the same, except where, under the latter, there is strict foreclosure, which is a judicial recognition of alienation on the part of the mortgagor who has failed to comply with the condition which would have rendered the conveyance of title nugatory. The effect of the decree in chancery is to render the title no longer defeasible; but there is usually given a time within which the debtor may yet recover the property by payment of his obligation with such interest and penalty as are imposed.

The common law mortgage differs from the civil, with regard to possession by the mortgagee; but even this feature has been changed by many of the States, so that the debtor retains the *res* as a thing hypothecated and not either pledged or conditionally sold. In chattel mortgages, however, the thing is ordinarily treated as a pledge, and delivery is essential.

§ 610. **The Lien.** The mortgagee's right is a conditional *jus in re*, under the common law unmodified by statute; but under the equitable construction of chancery courts, it becomes a mere *jus ad rem*, like the civil law mortgage lien. Though but one State of the Union has the civil law mortgage pure and simple, with the right of the creditor merely relative, most of the rest, by requiring proceedings to be by bill in equity, practically deny the absolute right; though they still preserve the form of conveying title, with a counter contract under which the debtor has his equity of redemption, yet mortgaged property is generally treated as an indebted thing liable to sale instead of forfeiture.

The right, however, is not relative, but conditionally absolute, upon which the mortgagee proceeds for strict foreclosure and a judicial recognition of forfeiture, as in the practice of some of the States, to which reference has been made.

§ 611. **Procedure.** For the purpose of the property decree, it is necessary that the court should have possessory jurisdiction over the *res*. In case the mortgagor have possession, it would be necessary that mortgaged real estate should be seized, at least by notification of seizure to the debtor. Where, under statute modifications, the mortgagee proceeds nominally as well

as really as a mere lien holder, (and not either as a pledge holder or as an owner in possession subject to defeasance;) where he proceeds under statutes that render the mortgage a civil law one in its principle characteristic, there must be seizure of the *res*, actual or constructive, before the court can have jurisdiction over it, whether the action be at law or in chancery. When such jurisdiction does not exist, the court can reach the property and sell it only through the personal debtor, and after judgment against him; though, where the mortgage imports confession of judgment, there may be little for the court to do but order the sale.

§ 612. **Pleading.** Is the *res* impleaded? Is the property, which has been brought into the court, made the real party defendant? and does the mortgagor appear in the capacity of claimant? Mortgage suits being almost always personal in form, the debtor is ordinarily considered the defendant, and the *res* is seldom said to be an impleaded thing. But if we bear in mind the duality of mortgage suits, and leave the debtor to the defense of the personal demand against him, upon his note, and take up only the real action, we shall see that the questions should be answered in the affirmative. This is readily done in case a third person has come into lawful possession and ownership of the *res* subject to the mortgage upon it. We find the property still burdened by the mortgage debt, but he would not be a personal debtor. Property has been condemned under the insurrection laws, with mortgages allowed in favor of intervenors, under the statute to protect liens, with rank superior to the right acquired by the United States upon condemnation of the property. It is clear that, under both such circumstances, the property is bound for the mortgage obligation, but its new owner is not bound beyond the value of the property.

Since the *res* is thus shown to be responsible, when in the hands of a third person who has not assumed to pay the mortgage note as a debtor, it is easily discerned that it is equally so before transfer, and may be impleaded as defendant, while the mortgagor is also personally impleaded as the debtor for the whole amount of the note, in States where the dual action is

allowed. Where the two suits are kept separate, the position of the *res* as the real defendant is yet more apparent.

§ 613. **Service and Record.** There is usually personal service of summons or subpœna, but that does not affect the character of the suit. Absentees are informed in various ways, often by service upon attorneys *ad hoc* appointed by the court to represent non-residents and to communicate with them. Notice to absentees may be by publication. In a suit to enforce a mortgage against the land of an owner not living in the State, notice by publication addressed to him was held equivalent to personal citation upon a resident; and the suit was held "brought" by such publication, though the petition had not been filed.¹

The recording of mortgages gives notice of their existence to the public: therefore a prior mortgage is not cut off by the foreclosure of a junior one, though it be not represented in court by its owner. Upon distribution of proceeds, liens outranking that of the mortgagee who has provoked the condemnation, are allowed so far as they are made to appear, either from the public records or by showing in court, though the notice may not have been a general one by publication.² Unnotified non-appears, however, cannot be injuriously affected by the proceedings.³

§ 614. **Chattels.** Mortgage of movables is common in several of the States. When such lien is recorded in one State, it is considered good in any other, unless it come in conflict with the letter or spirit of the laws of the place whither the chattel may have been conveyed. Replevin is the usual method of obtaining possession of the thing mortgaged, when the mortgagee's right of possession has arisen. It has been held that such lien holds notwithstanding a sale to a purchaser without notice,⁴ even in

¹ Foster v. Henderson, 54 Iowa, 220. But, see Billings v. Kothe, 49 Iowa, 34, an attachment case, but concerning like notice.

² Snyder v. Stafford, 11 Paige, 71; Bell v. Brown, 3 Har. & J. 481.

³ Haines v. Beach, 3 Johns. Ch. 459; Davenport v. Turpin, 41 Cal. 100.

But, see Brobst v. Brock, 10 Wall. 534.

⁴ Herman on Chattel Mortgages, §§ 79, 80; Bank United States v. Donnelly, 8 Pet. 361; Savary v. Savary, 3 Iowa, 272; Davis v. Bronson, 6 Iowa, 410; Arnold v. Potter, 22 Id. 198; Smith v. McLean, 24 Id. 322; Blystone v. Burgett, 10 Ind. 28; Bar-

a State to which a chattel has been removed, and where the lien has not been recorded.

§ 615. **Essential Features.** The decree, condemning the *res* to be sold to pay the debt, recognizes the confession of judgment which the mortgage deed imports, rather than pronounces judgment of condemnation. When the mortgage does not import confession, there should be virtual condemnation, (whatever the form in which the decree is couched,) as well as an order of sale.

The procedure, to constitute the real action, must have all the essentials of such action, and must maintain that analogy to proceedings against things impleaded under the admiralty and revenue laws, except general notice, which attachment suits against property possess, as shown in the preceding chapter. It would be tedious to run the parallel again in this, and it does not seem advisable. Nor does it seem necessary to pursue further the subject of the real mortgage action, since it has been shown to belong to proceedings with limited notice, and to be restricted in its effect to persons notified.

The general subject of mortgages does not come within the purview of this treatise; and it would not only burden the book to load it with citations of the numerous decisions upon foreclosure with which the reports abound, but it would tend to destroy the unity of the subject under treatment. So far as the mortgage action is personal, it is foreign to the topic under consideration; so far as it is virtually a real or property proceeding, it has been sufficiently treated in this brief chapter to show that it is brought under the principles elucidated at length in all the foregoing chapters, especially those of the first and fourth books.

§ 616. **Similar Procedure.** For like reason, other proceedings against Things Indebted need not be specially discussed. Under State insolvent laws and National bankrupt laws, soon as the surrender has been accepted and the debtor discharged, the proceedings are confined to the assets. Under statutes to exact

ker v. Stacy, 25 Miss. 477; Jones v. N. H. 50; Ferguson v. Clifford, 37 Taylor, 80 Vt. 42; Offutt v. Flagg, 10 N. H. 87.

contributions from property after assessment for drainage or other improvements, suits, though nominally personal, are really against the property rather than its owner, since the latter is not bound beyond its value. So, in some tax suits, the property is virtually the indebted and impleaded thing, though its representative be sued. So, also, when landlord's and mechanic's liens are sought to be enforced by process really *in rem*, the person cited as defendant is made such only as the sponsor for the thing. This is apparent when that thing has changed hands after the contracting of the obligation and before suit. When still in first hands, the action may be said to be dual. Nothing definite, however, can be generally predicated of such suits except that they vary as the statutes authorizing them vary, in the different States.

§ 617. **When not Property Actions.** The second class of suits which are *as if* against things, and aim at special execution of them, are really personal. The word *quasi* has been applied to so great a variety of circumstances as to render it better to depend here upon illustration than venture upon definition. Some of the proceedings, referred to below, will be found *quasi in personam* but really property actions.

By proceeding *quasi* against a thing is sometimes meant a personal action to obtain a personal judgment to be executed specially upon designated property. It is not essential to such a suit that there should be a pre-existing lien, for often its object is to have a lien judicially recognized, or to have it created or perfected when not existing in the incipency of the suit, except perhaps in an inchoate character. It is not essential that there should be seizure or jurisdiction over the property to be executed at the time of the institution of the action, though otherwise when the decree comes to be executed. No jurisdiction over a thing, distinct from that over the person or persons concerned, is acquired by the court. No information against it is filed except incidentally in the allegations against the personal debtor. The property is not impleaded as defendant, in any sense.

§ 618. **Illustrations.** The Supreme Court have said proceedings to foreclose a mortgage are *in rem* or "*quasi* proceed-

ings *in rem* at least.”¹ They are the latter, (but not in the sense which has been already treated,) when property is not impleaded but only apparently proceeded against to have a lien against it recognized, and to have it sold under execution with the plaintiff’s rank preserved. Under the statutes of some of the State, this is the prevailing form of the mortgage suit.

Attachment suits are of this class when the debtor responds to notice.² Tax suits are also of this class, when only persons are impleaded, though there be prayer for execution against specified property, since the proceeding is only apparently against it.³ Though there be seizure before judgment; and recognition, in the decree, of a privilege upon the thing seized, the proceedings would not thereby lose their personal character,⁴ nor be assignable to a different classification. They would merely be *quasi* against property,⁵ in a limited sense, but not real or property actions.

§ 619. **Mechanics’ Lien and Action.** Examples of *quasi in rem* proceedings where the judgment is usually prior to the seizure, may be found in suits of builders and mechanics to recover the amount of their debt, against their personal debtor, and have their lien for work or material recognized and ordered to be enforced by seizure and execution.

There is a bearing upon property, in such suits, from their incipieny; yet no thing is seized and brought into court to be impleaded. The judgment recognizes the lien and privilege of the builder upon the house that he has built, and orders it seized for the purpose of satisfying the lien.

After a judgment against one Leary, without any previous seizure of his property, but with the recognition of the builder’s lien upon it, the incumbered property was seized and sold under

¹ Ante, §§ 579, 605.

² Maxwell v. Stewart, 22 Wall. 77; Parsons v. Paine, 26 Ark. 124; McComb v. Allen, 82 N. Y. 114.

³ People v. Biggens, 96 Ill. 481; Union Trust Co. v. Weber, 96 Ill. 346.

⁴ See Mayor v. Colgate, 12 N. Y. 140; Husbands v. Jones, 9 Bush. 218;

McInerny v. Reed, 23 Iowa, 410; Dubuque v. Wooten, 28 Iowa. 571; Ohio Life Ins. Co. v. Goodwin, 10 Ohio St. 557; Pittsburgh’s Appeal, 70 Pa. State, 142; Hamilton v. Dunn, 22 Ill. 259.

⁵ Craw v. Tolono, 96 Ill. 255; City of Va. v. Hall, 96 Ill. 278; Biggins, v. People, 96 Ill. 381.

execution. This was in New York: and when afterwards the question was raised whether Leary had a right to redeem the real estate, (under a general statute of that State which allowed redemptions¹ on sale of real estate under execution,) the court of Common Pleas denied the right on the ground that the statute applied to sales under actions *in personam* but not to actions *in rem*.² This ruling was supported by the citation of other cases.³

Proceedings by the mechanic to have judgment against his employer with a recognition of his lien and an order enforcing it, under the laws that prevail on the subject in most of the States, are *quasi in rem*.⁴ Mr. Phillips, (in his work on Mechanics' Liens,) states that they are only proceedings *quasi in rem*; and gives the true reason: "The suit is always *inter partes* and confined to such parties."⁵ The decree affects only those who have been made parties to the action,⁶ though inferior liens are superseded.

§ 620. **Other Liens.** Liens of landlords, hotel keepers, vendors, and others not heretofore mentioned, are generally vindicated by personal actions with a prayer that the privilege upon the thing bound be recognized in the judgment sought.

The landlord, proceeding against his tenant, to obtain a judg-

¹ N. Y. Rev. Stat. ii. 370.

² See *Randolph v. Leary*, 3 E. D. Smith, 637.

³ See cases there cited; especially *Cronkright v. Thomson*, 1 Id. 661 and 4 Abbott's Prac. R. 205; *Mechanics' Lien Law of New York City*, of 1863, repealed by that of 1875; *Heckman v. Pinkney*, 81 N. Y. 211.

⁴ *McGraw v. Bayard*, 96 Ill. 146; *Hickox v. Greenwood*, 94 Ill. 266; *Cairo & Vin. R. R. Co. v. Fackney*, 78 Ill. 116; *Hamilton v. Dunn*, 22 Ill. 259; *Clark v. Boyle*, 51 Ill. 104; *Hamilton v. Naylor*, 72 Ind. 171; *Woollen v. Wishmer*, 70 Ind. 108; *Marvin v. Taylor*, 27 Ind. 73; *Redfield v. Hart*, 12 Iowa, 355; *State of Iowa v. Lake*, 17 Iowa, 215; *Jones v. Swan*, 21 Iowa, 184; *Noel v. Temple*,

12 Iowa, 276; *McIverny v. Reed*, 23 Iowa, 410; *Stockwell v. Carpenter*, 27 Iowa, 119; *Clifton v. Foster*, 103 Mass. 233; *Rose v. P. & B. Works*, 29 Ct. 256; *Goodman v. White*, 26 Ct. 317; *Coleman v. Freeman*, 3 Geo. 137; *Hilliard v. Allen*, 4 Cush. 532; *Canal Co. v. Gordon*, 6 Wall. 561; *Jackson v. Davenport*, 20 Johns. 537; *Kendall v. McFarland*, 4 Oregon, 292; *Wharton v. Douglass*, 92 Pa. St. 66.

⁵ § 306, and case cited there by him: *McKim v. Mason*, 3 Md. Ch. 186.

⁶ *Holland v. Jones*, 9 Ind. 495; *Brown v. Wyncoop*, 2 Blatchf. 230; *Shaw v. Hoadley*, 8 Id. 165; *Williams v. Chapman*, 17 Ill. 423; *Kimball v. Cook*, 6 Ill. 427; *Kelly v. Chapman*, 13 Ill. 534.

ment for rent due, or in certain circumstances, for rent becoming due, may, under the statutory regulation which prevails in some of the States, obtain provisional seizure of the goods upon which his lien rests. He usually prays not only for judgment in a certain sum against the defendant, but also for a judicial recognition of his lien against the goods; and this feature of the case renders it *quasi* against the goods.¹

Where there is a lien to be enforced there is a *jus ad rem* susceptible of vindication by the *actio in rem*; the property is an indebted thing, irrespective of the owner, as fully as in any case; the decree might be made against the thing only: *provided*, that such procedure were authorized by the expression of the legislative will. But, in the absence of such authorization, the procedure must be personal, conducted contradictorily between the plaintiff and defendant, with no movement against the thing, but with the purpose of having the lien enforced by execution, which is not an *action* against property.²

§ 621. **Mixed Actions.** The two distinct forms of action should not be mixed.³ When a thing is seized; charged with guilt, hostility or indebtedness; and condemned as bearing primary responsibility, the action against it is not the less one *in rem* because some pleader has asked, and some court has granted, a personal judgment against the owner of that thing, at the same time.⁴

It was formerly *queried* whether a libel for salvage could be both *in rem* and *in personam*,⁵ but it is now held that salvors cannot, in the same libel, proceed *in rem* against a vessel, and *in personam* against the consignees of the cargo.⁶

¹ The landlord's lien, in the District of Columbia, has been held good without possession. *Beall v. White*, 4 Otto, 382. But, see *Webb v. Sharp*, 13 Wall. 14, and *Fowler v. Rapley*, 15 Wall. 328.

² *Dorsey's Appeal*, 72 Pa. St. 192; *Wilson v. Reuter*, 29 Iowa, 176.

³ *Cit. Bank v. Nantucket Steamboat Co.*, 2 Story, 16; *The Merchant*, Abb. Ad. 1; *The Ogdensburg*, 5 Mc-

Lean, 622; *The Atlantic*, 1 Newberry Ad. 139. See *Kershaw v. Thompson*, 4 Johns. Ch. 459; and *Downing v. Palmateer*, 1 T. B. Monroe, 64.

⁴ *The Zenobia*, Abb. Ad. 48; *Newell v. Norton*, 3 Wall. 257.

⁵ *Bondies v. Sherwood*, 22 How. 214.

⁶ *The Sabine*, (11 Otto,) 101 U. S. 384. See *Newell v. Norton*, 3 Wall. 257.

If salvors cannot thus mix incongruous actions, ought not the same rule to apply to all others?

"Proceedings *in the nature* of a proceeding *in rem*," is a phrase often used by the court. It may be found applied to cases where the proceeding is as good a model of the action *in rem* as the books afford. It may be found applied to causes which have not the first true element of that action. It is always used in a vague way; and tends to confusion rather than perspicuity.

§ 622. **Judicial Sequestration.** Sequestration, under the law of those States which use the process, is not an action *in rem*. It is a civil law seizure, but not a proceeding against anything.¹ It is called judicial sequestration to distinguish it from what was known as a deposit of a disputed thing, by contending parties, into the hands of a third person called a *sequestrator*, because the seizure is by order of the court.

Judicial sequestration, though usually exercised against movables, is also applicable to immovables. The court takes possession of a chattel or of real estate, as the case may be, upon application of the party claiming to have the right to it; but this sequestering, or taking possession, is in aid of the personal party who may be decreed the right of possession. The writ of sequestration, therefore, should be considered as auxiliary to a personal action.

Judicial sequestration differs from attachment proceedings *in rem* in this important particular: its object is not to have the *res* condemned, while that of such attachment is to have the *res* condemned. Therefore, though in sequestration we seize the *res*, yet we institute no *action* against it.

¹ Daugherty v. Vance, 30 La. Ann. part ii., 1246; Lemann v. Truxillo, 32 (La.) Ann. 65.

CHAPTER LVII.

THE FACT UNDERLYING THE FICTION OF THE RESPONSIBILITY OF THINGS.

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§ 623. **Divestment of Personal Interests.** Personal interests are always passed upon when property is condemned. This is no legal fiction. This is a significant fact which underlies the fiction of the judicial declaration when property is condemned as a personified defendant. In this fact may be found the source of many difficulties and misapprehensions concerning the action *in rem*; and perhaps here also may be found the key to the solution of important problems involved in that remedy.

It is impossible that the new title, free from all incumbrances can arise by reason of an absolute condemnation, without the previous displacement of all pre-existing rights and interests in or to the property condemned. Not only the former proprietary title, but the interests of innocent lien holders must necessarily be adjudicated.

The fact that personal rights and interests are passed upon by courts which have no jurisdiction over the persons who own

those rights and interests; who are not cited as parties defendant; who may not be susceptible of being personally cited; who are informed of the process, against the impleaded property, only by publication; who may be domiciliated beyond the court's district or state, or even in a foreign country; who are treated, in all cases, as though they lived beyond the jurisdiction; who can appear only as voluntary claimants or intervenors; who cannot become parties-defendant in the usual sense of the term, and whose interests, when consisting of liens resting upon the seized thing, may not be charged with guilt, hostility or indebtedness nor be amenable to any such charge, is repugnant to all sense of justice when considered alone without its relations.

The injustice seems the more apparent when the interests of non-resident lien holders are kept in view; for the charge of guilt, hostility or indebtedness, made in the libel against the *res*, is not made against any lien resting upon the *res*; and therefore the fiction of responsibility is inapplicable to such interests. The seeming hardship is yet more repugnant when such foreign lien holders have not been really reached by the published invitation to appear, and when the presumption that they have been thus reached is evidently violent.

It is true that the obligation of the personal debtor is not cancelled by the condemnation of lien-bearing property, but the previous lien holder finds himself but an ordinary creditor after its condemnation. He has lost the security which he had before the condemnation of the property upon which his mortgage or other lien rested.

§ 624. **Divested by Courts Without Jurisdiction Over the Persons Concerned.** The anomaly is presented of a court having power to pass upon interests, against which there are no charges, while it has no jurisdiction over the person in whom those interests are vested. A citizen, not sued; or a foreigner, not within the bailiwick, not sued and not susceptible of being sued; both, without any proceeding directly against their property rights, find themselves divested of their interests by a decree of court rendered against the property of some other person.

The court, in a proceeding *in rem*, is totally without jurisdiction over the persons whose interests are to be divested by its judgment of condemnation; it is without power to summon them into court so as to make them parties liable to the costs of suit, whether they live within or beyond its territorial jurisdiction. Yet it must be clothed with authority to hear and determine the rights of those persons relating to the seized and impleaded property, or there could be no decree that would affect such rights. There must be separation, in idea, of the rights from the owners, with respect to the jurisdiction. The rights, adjudicated when the property is adjudicated, are only those that appertain to it. Necessarily, jurisdiction over the thing seized and impleaded, to the extent of power to condemn it absolutely, includes jurisdiction over the rights therein of all persons whatsoever. The thing is property: it would not be property were its value eliminated: therefore it must include all the property-right associated with it. The thing is seized and impleaded with reference to its value—not merely its value beyond its ability to satisfy the liens resting upon it. The thing is seized and impleaded—not the liens: yet the latter must fall with it upon its condemnation.

§ 625. **All Persons Have the Right to be Heard.** Every holder of an interest is afforded the opportunity of being heard. Personal citation of all the world being impossible, the law resorts to the best practical mode when it requires a call, by advertisement, upon all persons interested. It is impossible that all persons can be sued; and it is impossible that any person can be sued when he as well as his lien or other interest is altogether unknown. Some uniform method is necessary which may be applicable to secret as well as to recorded liens; applicable to unknown as well as known interests; since, otherwise, the condemnation of property so as to give rise to the new title, free from all incumbrances, and relieved from all liability to subsequent attack by holders of pre-existing claims, would be manifestly impossible; and the system of proceedings *in rem* would go for naught.

The method adopted seems to be the best of which the case is susceptible, as well as the most convenient. Whether so or

not, it is the method which has been adopted. And whatever there may be of apparent injustice in the system, there is another side from which it may be viewed where the injustice of refusing the action is very much more apparent. If no rights could be divested without the personal citation of all those interested, the government could rarely enforce forfeitures; the poor sailor must go without his wages till he find the foreign ship-owner; the lender upon bottomry must cross seas to institute his personal action; the salvor must go unrewarded unless he can reach those whom he has personally benefited; and almost all who are now entitled to proceed *in rem* must be denied their rights.

The personal service of a summons or *subpoena* upon every man being impossible, publication is substituted as the best that can be done under the circumstances. Whatever of injustice there is in the whole system of procedure *in rem* lies just here: in the substitution of publication for personal citation.

It is essential to justice that every person whose interests are liable to be affected by any judicial proceeding be afforded the opportunity of being heard. It is not essential to justice that that opportunity be afforded only by personal citation, in a suit against such person, forcing him into court, or, at least, subjecting him to jurisdiction over his person, making him liable to costs, to punishment for contempt and to court orders generally.

Seizure and general notification give the court jurisdiction not only over the article taken in hand by the marshal or sheriff and brought into court, but also of all rights and interests of all persons in or to that article, in the absense of any jurisdiction whatever over the persons whose interests are liable to be adjudged.

§ 626. Divestment not "Irrespective of the Rights of Persons." How often it has been said that proceedings *in rem* are "irrespective of the rights of persons!" The quoted phrase needs qualification. Whenever it has reference to notified non-appearers, who have been defaulted, it is true in the sense that the action is conducted against the *res* without being hindered by the existence of interests not asserted; but whenever it is

used to convey the idea that a piece of property may be made the defendant and may be condemned without respecting the ownership of it, or the claims upon it of others besides the libellant, so far as to give them the chance of saving their interests, it is false and untenable.

While property actions are not *inter partes*, (though the affirmative has sometimes been erroneously held,) they are not "irrespective of the rights of persons," in the sense that personal interests are disregarded. There can be no decree conclusive upon all, unless all have had the opportunity of being heard. There can be no decree conclusive upon one, unless the one has had the opportunity of being heard. The presumption of law is that all persons are reached by the published notice; and, from the nature and exigencies of the case, such presumption cannot be rebutted. Though sometimes violent, it is supported both by necessity and justice: by the former, because it cannot be known or proved that everybody reads the advertisement; and by the latter, because there would be great wrong in disturbing decrees after their maturity upon the application of some defaulted owner or lien holder on the ground of ignorance of notice.

Because all persons thus have the opportunity of enjoying their "day in court," it is frequently said that "all the world are parties." That the proceedings are not between personal parties, and that all the world are parties, is true though seemingly paradoxical. It would seem that no one could fail to understand it in the sense in which the contradiction is reconciled.

Yet, from inadvertance perhaps, failure to discriminate has heretofore sometimes led to fallacious conclusions. It has led to the following definition: "Proceedings purely *in rem* are where the court, in its plenary power of the law, based upon legislative will and the authority of the government, lays hold of and acts directly on the property itself, and transfers its ownership to the purchaser by title paramount to that of the owner, and '*without regard to the persons who may have an interest in it.*'"

Whence did "the law" get such "plenary power;" or the legislature such potent will; or the government such arbitrary authority thus to disregard all distinction between *meum* and

tuum? Whence did they get license to destroy constitutional guarantees to personal rights of property? How did they become arbiters of ownership so as to transfer it from one man to another, regardless of those who have an interest in the property?

Such a definition might just as well be applied to a proceeding *in personam*. It might as well be said that, in such action, the court, in its plenary power, transfers the ownership of the defendant to the plaintiff regardless of the rights of the defendant. And yet definitions similar to that above quoted, (frequently in almost the same words,) may be found scattered through the books; and there is no lack of decisions to sustain them.

§ 627. **Presumption of the Assent of Non-Appearsers.** Perhaps the fact that personal interests are always adjudicated when property is condemned, has been overlooked in consequence of a mistaken conception of the doctrine that proceedings *in rem* are not *inter partes*; the court having no jurisdiction over the owners of property proceeded against. That doctrine, indeed, forbids any judgment against persons, but it is a very different matter to say that it disregards their property rights. The proceedings are on the assumption that the owners themselves have already forfeited their rights of property, by using it in contravention of law, for instance. Whether the property has already acquired the *status* of a forfeited thing, is the question the court has to determine. Having no jurisdiction over its owners, who are not sued, the court yet regards their rights by inviting them to come into court and claim the property, and treating them as having abandoned all pretensions to it, if they do not come. Then, in his decree pronouncing the *status*, that is, pronouncing whether the property is a forfeited thing or not, the judge, impliedly if not expressly, also declares that the former ownership has been divested and the title lodged in the libellant. It should also be remarked that the default of non-appearsers, entered previous to the pronouncement of the thing's *status*, though not a personal judgment against the owners in the usual sense, is yet a judicial negation of their further rights to appear voluntarily to claim; it is a preliminary estoppel to

any hindrance of condemnation on their part. And the right thus to enter judgment of contumacy and default, rests entirely on the presumption that they have been invited to come and have refused, and that they have thus by silence assented to the judicial declaration of the forfeiture of the *res*, or its condemnation to pay the *lien*; or that they have tacitly disavowed any right or interest in the proceedings.

§ 628. **Notice, with Reference to the Divestment of Personal Interest.** The extent of a decree's effect is measured by the notice. In State practice, limited notice has often been employed where the decretal effect sought was the concluding of all persons. It has been not infrequently held that in the absence of monition or publication to all persons having or pretending to have any right, title or interest in or to the thing seized, bidding them come forward and assert their claims within the legal delay, such persons might yet have their rights in or to that thing cut off by the decree of condemnation rendered against it. The fallacy of such ruling may often be detected in the use of the phrase "proceeding *in rem*," without any qualification. Some time-honored decisions, well established as a precedent, is quoted from MANSFIELD, MARSHALL or STORY, in which a proceeding *in rem* is held "good against all the world, for all the world are parties," yet the reason is overlooked by those who quote, and they then declare a proceeding under limited notice good against all the world, though all the world are not parties—not constructive parties—not invited and defaulted parties. They fail to see that the authority they are invoking is a decision in a case of general notice; they only see that the precedent case was *in rem*; they come to the mistaken conclusion that all decrees in cases *in rem* are universally binding, and they render their judgments accordingly. This too common fallacy may be discovered in many cases of probate, mortgage lien, attachment, tax suits, and the like, when the notice is special and limited, (as it usually is in such cases,) and when the proceedings are only *quasi* against things.

No attempt will here be made to collate the decisions in which limited notice has had the effect of universal notice attributed

to it. The reports are dotted with them. They are frequently found in cases where previous decrees against property are urged as conclusive against persons never notified by publication or otherwise.

Happily, the opposite error is more rare. The general notice has not frequently been mistaken for the limited. The decisions in which it was so mistaken, pointed out in the thirty-sixth and thirty-seventh chapters herein, stand almost alone in the books. The conflict between those decisions and the decrees rendered in cases *in rem* which they collaterally attacked, could never have existed if the effect of general notice had been kept in view. Had it been recognized that the property involved had been duly condemned pursuant to lawfully authorized general notice, the pleas *res a iudicata quoad omnes*, set up in defense of the collateral attacks, must surely have been sustained.

Both these errors are probably traceable to the fact underlying the fiction of property responsibility. A tender and commendable regard for the interests of persons has caused the proceeding with general notice to have its legitimate effect allowed rather grudgingly on the one hand, while, on the other, such interests have been made to suffer by reason of the misapprehension that all proceedings *in rem*, though with limited notice, are universally conclusive—the sacredness of personal rights being sacrificed to the principle of *stare decisis* sadly misapplied.

§ 629. **State Jurisdiction, in Property Actions, Over Personal Rights.** It has been thought by some that a proceeding *in rem*, where the notice is not general, is binding upon all the people of the State where such proceeding is had; and, it has been thought, at the same time, that even such proceeding, with general notice, would not affect the rights of persons beyond such State. Are not both the errors, deprecated in the foregoing section, found outlined in such opinions?¹ The

¹ See and compare *Melhop v. Doane*, 31 Iowa, 397; *King v. Vance*, 46 Ind. 246; *Pennoyer v. Neff*, 95 U. S. 714; *Green v. Van Buskirk*, 7 Wall. 139; *Price v. Hickok*, 39 Vt. 292; *Jones v. Spencer*, 15 Wis. 583; *Molyneux v. Seymour*, 30 Ga. 440;

Arndt v. Arndt, 15 Ohio, 33; *Johnson v. Holley*, 27 Mo. 594; *McLaurine v. Monroe*, 30 Mo. 462; *Sevier v. Roddie*, 51 Mo. 580; *Rape v. Heaton*, 9 Wis. 823; *Thompson v. Emmert*, 4 McLean, 96; *Grant v. McLachlin*, 4 Johns. 34; *Croudson v. Leonard*, 4

theory from which the errors arise is that the court has jurisdiction within the State but not beyond it. Doubtless, the true rule is that the court, in a proceeding *in rem*, has no jurisdiction over the owners of the property proceeded against, when they are not sued, whether they are within or without the State; and that the jurisdiction over the thing, and over the rights of all persons in or to the thing, is measured by the notice, without reference to State lines and to personal jurisdiction. One must look to a State law, however, to see, in any case, whether the remedy of the action *in rem* with general notice has been authorized.

§ 630. **State Restriction to the Action at Law In Rem.** In State practice, the *quasi* action is more generally in use than the direct property action; and, whenever there is resort to the latter, the proceedings are almost always conducted with limited notice. There seems to be some doubt and uncertainty, and perhaps no little misapprehension, with regard to the right of a State to proceed against property, after general notice, so as to produce the effect of a proceeding under Federal law concluding the world. Indeed, there are found many expressions, not only in the State reports, but also in those of the United States, which indicate that their authors rather doubted whether an action against a thing, with notice by publication only, resulting in a decree of universal application, is not peculiar to admiralty practice.

Proceedings *in rem* at law are as well grounded in right, in reason, and in constitutional warrant, as such proceedings in admiralty. In Federal practice, the remedy is as readily employed in cases at law as in maritime causes. When revenue seizures are made on land, the proceedings against the *res* are at law with the same conclusive result is if based upon a seizure on water. This is true of like seizures under the collection, navigation, insurrection and other laws.

The several States of the Union, within their sphere, have as much right to this remedy in cases at law, as the Federal gov-

Cr. 434; *D'Arcy v. Ketchum*, 11 How. 26 La. Ann. 113, (referring to *Ennis*
165; *Edmunds v. Montgomery*, 1 v. Smith, 14 How. 430.
Iowa, 143; *Cabalero v. Maduel*, Exr.,

ernment has, within its sphere. They are not inhibited by the Constitution of the United States; nor is any State limited to personal actions by its own organic law. Exclusive admiralty and maritime jurisdiction is conferred upon the general government; and also exclusive jurisdiction at law, so far as concerns the levying and collecting of its own revenue, and the exercise of the various powers lodged exclusively with it, by the Constitution; but the reservation of all other rights and powers to the States or to the people, includes all remedies at law not confined to the general government, so that any State, within its jurisdictional sphere, may resort to the property action as freely as may the Federal government within its province.

The judiciary act,¹ in "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it," after conferring upon the United States District Courts the exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, ought not to be construed to save to suitors the common law remedy only. The statute has been thought to distinguish between common law remedies and other remedies at law; but it should be understood so as to make it consonant with the Constitution which distinguishes only between admiralty and law² without reference to any system of law. All remedies at law are reserved to suitors by the Constitution where they do not clash with the admiralty provision; and, whether the legal remedy must be sought in a State or a Federal court depends, of course, upon the jurisdiction in any given case.

§ 631. **"Saving to Suitors the Common Law Remedy."** Many times this "saving to suitors the common law remedy," (in qualification of the grant of admiralty jurisdiction to the Federal courts,) has been treated as though it limited them to personal actions, and as though it had all the force and dignity of a constitutional provision. When actions for torts committed upon rivers, have been brought in State courts they have sometimes been sustained, but with the intimation that had the pro-

¹ U. S. Rev. Stat. § 563.

² Const. art. i., § 8, clause 9.

ceedings been *in rem* they would have conflicted with the exclusive grant of the admiralty jurisdiction to the general government: just as if the action *in personam* were not as much an admiralty action as that *in rem*. When most of the States created both the lien and the remedy, (to meet the want, after repairs and supplies in home ports had been decided to be without maritime character,) much distinction was made between personal and property actions in the solution of the questions whether the State legislators had exceeded their powers. Cases in which the action *in rem* was assumed to belong especially to admiralty practice, need not here be cited merely for the purpose of criticism. It is sufficient to say that there is no decision that renders such assumption binding as law.

Strike out the word "common" in the foregoing quotation from the judiciary act, and the sense will be retained, and all variance from the Constitution will be avoided. The right of suitors, in the State courts, is not confined to such remedies as the common law is competent to give, but extends to all remedies at law which are within the purview of State jurisdiction. A personal action, if the case be one really and exclusively of admiralty jurisdiction, is as untenable, in State practice, as an action *in rem* under such circumstances.

If it be said, however, that the judiciary act is free from ambiguity, and that therefore we have no right to eviscerate the word "common," the objection may be conceded without impairing the suitor's right to the remedy *in rem*, since the constitutional reservation is broad enough to cover the case. All rights and powers not granted exclusively to the general government are reserved: This remedy is not so granted: therefore it is reserved.

If it be said that the common law is older than the Constitution, that it was in full force when that instrument was framed, and that it was the system of law which the framers had in mind and to which they constantly referred, the objection may be conceded, but with this qualification: the common law as it existed when the Constitution was adopted, and before, was not a fixed but a growing system, drawing additions from the civil law from time to time as necessity, convenience and legal science

required; and it had already incorporated the direct property-action and had had it in use not only from the founding of the colonies, but long before, in the mother country. The United States Supreme Court have spoken of the remedy as one at common law: "Everything necessary to a common law proceeding *in rem* is found in the record. An information was filed, (called a libel of information, it is true, but still an information,) a citation as well as a monition was issued, a default was taken, and, after consideration of the evidence, condemnation was adjudged. What was lacking in this to a common law proceeding *in rem*? * * * The substance and all the requisites of a common law proceeding are found in the record."¹ Certainly such action lies at law, and did so when the Constitution was adopted; and there can be no doubt that references to law, in that instrument, were to law as it then existed; and also with anticipatory reference to statute modifications, advances and innovations. The suitor's right to resort to the property-action is as well grounded as his right to the personal proceeding. Whether at law or in admiralty, the right to either form may exist, depending upon the existence of a lien, statute authorization, etc.

§ 632. **The Boundary.** The debatable ground lies not between the two forms of action but between the two systems of practice. It is the border land where the systems intershade each other. It is where a given state of facts may give rise to doubt whether the action should be in admiralty or at law.

The indefiniteness of the boundary must often render the suitor doubtful as to where he stands. It may be said that if the question of jurisdiction depends upon a statute, those who affirm the jurisdiction are not entitled to the benefit of the doubt.

Whether there is conflict of jurisdiction between admiralty and law practice, or between Federal and State jurisdiction, the question of a suitor's right to resort to the action *in rem* is not necessarily involved. When such action is at law, he may

¹ The Confiscation Cases, (Slidell's Land and Conrad's Lots,) 20 Wall. 110.

institute it in either a State court or a Federal court—which ever has jurisdiction—if he has a case to which such remedy is applicable and authorized by statute. There is no inhibition either in the Constitution or the judiciary act, through any incompetency of the common law.

When the direct property action, with general notice by publication, is duly authorized by any State, the result is binding upon all; not merely binding upon all the people of such State, but upon those of every other State, and of all foreign States, just as a decree in such a case in a United States Court, either at law or in admiralty, would be thus binding upon all.

§ 633. **Comity.** Comity does not affect the matter. Comity is to be considered when the recognition of a judgment of one State, is optional in another. Where the juridical morals of one State of the Union conflict with those of another; where, for instance, one State allows the debtor to make preferences among creditors when he is making an assignment, while another State, where the preferred creditors have the *onus* of sustaining such assignment, holds such preference fraudulent, the latter is not bound by comity to give effect to such assignment; and, in slavery times, where a title to a slave was adjudged in one State, comity would not have required a free State court to have given effect to the judgment. But where, under the laws of any one State, after general notice, after opportunity given for all to appear, and after regular proceedings, a decree against a thing has been rendered and has become *res judicata quoad omnes*, no other States can refuse to give it respect on the ground that they have provided for no such proceedings.

The requirement that full faith and credit shall be given in each State to the judicial proceeding of every other State,¹ is applicable to State proceedings at law against things.

When a State statute provides for only partial proceedings *in rem*, and excludes the appearance of all non-residents, yet aims to make the decree binding upon all persons, such proceedings are not entitled to credit in other States when urged

¹ Const. art. iv. § 1.

against the interests of citizens of those States. The decree, in such proceedings, is not *res judicata* with regard to those who have not been accorded the opportunity of being heard.¹ It is not so, even with regard to citizens of the State in which it is rendered, if they have not had their right to their "day in court." No consideration of comity obliges one commonwealth to do injustice from a mere sentiment of amenity towards another. Justice is before politeness. No constitutional provision requires any State to give faith and credit to the decrees of another beyond the legitimate bounds of such decrees.

Those bounds are to be measured, not by the whim or caprice or even the polity of the State where the decrees are sought to be enforced, but by settled principles of jurisprudence; by the science of law. No State can set up a system antagonistic to that of the rest, of such a character as to deny settled principles of legal science and well established methods of procedure not juridically immoral, because repugnant to its own peculiar policy, when such policy is not based on moral grounds. The character of a valid decree, and the extent of its operation, as well settled by legal practice and firmly fixed in legal principles, find ample protection in the Constitution and its exposition by the Supreme Court.

§ 634. **Legislation and Construction Should be Liberal in Protecting Personal Rights.** Statutes authorizing the property action should be strictly construed. Statutes protecting personal interests should be liberally construed. Seizure should not be held sufficient notice to those not legally presumed to take cognizance of it. Jurisdictional facts should be closely scrutinized when proceedings *in rem* are brought legally to test, either within or without the State where the action was tried.

The monition should be made as public as possible, and should continue for the full time required; and, were the usual time greatly extended by the legislator, it would be a wise and beneficent advance. Should he limit the use of the prop-

¹ Wright et al. v. Maxwell et al., 4 Mich. 58.

erty action to cases where the personal one would be impracticable or greatly inconvenient, and give the owner of seized property the right to except or demur to the former action on the ground that the latter would lie, perhaps the result would be beneficial, and conservatory of civil right; for whenever a personal suit is practicable, and when the ends of justice can be reached without the disturbance of the rights of persons residing beyond the jurisdiction of the court, it would seem that such action should be preferred.

§ 635. **Misapprehensions Attributable to Respect for Personal Rights.** No doubt the abuse of the property action by those who have claimed for its decrees finality against unnotified persons, has led greatly to the opposite error of denying the legitimate effect of conclusive decrees after general notice. No doubt it has led to many of the misapprehensions that have prevailed with regard to direct procedure against property; and especially to the opposition it has encountered from the charge that it is disregarding of personal interests.

That misapprehensions have existed, is quite patent. "The vague and apparently conflicting opinions entertained" "by learned judges" with regard to "the nature and incidents of a proceeding *in rem*," were remarked by Mr. Justice WHIPPLE, as the organ of the Supreme Court of Michigan, when deciding a case arising under the "boat and vessel law" of that State; and he added: "A survey of the numerous authorities, cited by counsel, has left upon my mind a deep impression that in those States where proceedings of this nature are seldom resorted to, great misapprehension exists as to its true character."¹

Whether such misunderstanding still prevails or not, there is something apologetic to be pleaded in behalf of those who may err on the side of clemency. Their zealous guardianship of personal rights is to be commended. Their mistrust of the property action, so long as they deem it "irrespective of the rights of persons" should not be harshly criticised. A "survey of the authorities" found in the reports, State and Federal,

¹ Wright et al. v. Maxwell et al., 4 Mich. 53.

in the preparation of this treatise, has left the impression that, while there has been inconsistency, (arising mainly from the want of a systematic arrangement of the subject,) the doubtful deliverances of learned and conscientious judges have often been on the side of clemency, and of zeal for the sacredness of personal rights.

§ 636. **Stare Decisis.** Happily, in traveling over the ground, one decision has been found to counteract the wrong tendency of another; many "misapprehensions" have been made apparent so as to show that though wrong principles may have been stated yet they have not settled into doctrine; many truly able expositions of the "nature and incidents of a proceeding *in rem*" have served to cure defects of oversight, so that it may be truly said that the general trend of exposition, from Marshall's day to the present, has been mainly in the right direction; and that, with regard to this subject, the doctrines of the courts now, State and Federal, so far as they are settled, are in accord with those presented in this treatise.

The very reverence which a lawyer must entertain for the principle of *stare decisis* forbids that he should respect unauthorized deliverances of judges. The greater his deference for a judicial tribunal, the more must he deplore renderings *coram non judice* when purporting to emanate from the bench. However inferior the forum, its lawfully pronounced decrees, when final, must be esteemed sacred as those of the highest. It has been, therefore, in no spirit of captious criticism, that decisions, State and Federal, have been reviewed herein; that the deliverances, in the absence of jurisdiction, have been eschewed; and that evidently true and settled principles have been evolved from the body of the decisions.

While no country can boast of a judiciary more able, learned and conscientious than our own, yet, in the absence of any systematic arrangement of the subject, proceedings *in rem* have given rise to many conflicting decisions; but it is not allowable to say of any judicial question: "*Stare decisis*," until it has been definitely settled. Not our courts alone, but those abroad have failed, with regard to the property action, to harmonize all mooted points with legal science.

It has been herein attempted, for the first time, to evolve, from a mass of matter, a symmetrical division and adjustment of the material, and to present to the profession what has really become established as the law of the subject. Decisions have been freely examined, to ascertain what the courts definitely hold and what the profession may depend upon as finally determined; to show that the "conflicting opinions," which Judge WHIPPLE wrote of nearly thirty years ago, have not been settled the wrong way; to expose the errors which have caused all the trouble, point out their source, and to demonstrate that they cannot possibly have crystalized into law.

§ 637. **Conclusion.** Though the whole system is based upon legal fiction, this treatment of it has been with full recognition of the legal maxims: *Fictio legis inique operatur alieni damnum vel injurium; Fictio cedit veritati.*

There can be no royal road to the condemnation of a man's property irrespective of his interests and his right to be heard. The Constitution must not be violated by the taking of property without due process of law; a dumb, inanimate defendant must not be denied defense through its owner; doors of justice must not be barred to rightful litigants, nor opened to defaulted ones, through misapprehension of the effect of notice; nor should the fiction of the primary responsibility of a thing ever be recognized without the simultaneous recognition of its underlying fact.

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